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Supreme Court, U.S.
FILED

071550 JUN 12 2008

OFFICE OF THE CLERK

No. 07-1550

IN THE
Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY
D/B/A AT&T TEXAS,
Petitioner,

v.

TEXAS CABLE ASSOCIATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 12, 2008

QUESTION PRESENTED

Whether a plaintiff association purporting to challenge the validity of a state statute in all its applications to all its members must — under the rule announced in *United States v. Salerno*, 481 U.S. 739, 745 (1987) — allege that "no set of circumstances exists" under which the challenged statute could lawfully be applied to the association's members.

PARTIES TO THE PROCEEDINGS

Petitioner Southwestern Bell Telephone Company d/b/a AT&T Texas (formerly known as Southwestern Bell Telephone, L.P. d/b/a SBC Texas) was an intervenor-defendant in the district court proceedings and an appellee in the court of appeals proceedings.

Respondent Texas Cable Association (formerly known as Texas Cable & Telecommunications Association) was the plaintiff in the district court proceedings and the appellant in the court of appeals proceedings.

Respondents Texas Coalition of Cities for Utility Issues, GTE Southwest Inc. d/b/a Verizon Southwest, and Grande Communications Networks Inc. were intervenor-defendants in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Paul Hudson, in his official capacity as Chairman of the Public Utility Commission of Texas ("Texas PUC"), and Julie Parsley and Barry Smitherman, in their official capacities as Commissioners of the Texas PUC, were defendants in the district court proceedings and appellees in the court of appeals proceedings. At the present time, Mr. Smitherman is the Chairman of the Texas PUC and Mr. Hudson is a Commissioner of the Texas PUC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Southwestern Bell Telephone Company d/b/a AT&T Texas (formerly known as Southwestern Bell Telephone, L.P. d/b/a SBC Texas) states the following:

Southwestern Bell Telephone Company d/b/a AT&T Texas is a wholly owned, indirect subsidiary of AT&T Inc., which is a publicly held company. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

During the pendency of the proceedings before the district court and the court of appeals, petitioner was organized as a limited partnership known formally as Southwestern Bell Telephone, L.P. Beginning on June 21, 2007, the limited partnership was discontinued and it became a Missouri corporation known formally as Southwestern Bell Telephone Company.

Petitioner here refers to itself by its trade name, AT&T Texas.

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Southwestern Bell Telephone Company d/b/a AT&T Texas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not reported (but is available at 2008 WL 344757). The opinion of the district court (Pet. App. 18a-26a) is reported at 458 F. Supp. 2d 309.

JURISDICTION

The court of appeals entered its judgment on February 7, 2008. Timely petitions for rehearing and rehearing en banc were denied on March 14, 2008. *See* Pet. App. 27a-30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of United States Constitution, the Communications Act of 1934, and the Texas Utilities Code are set forth at Pet. App. 31a-61a.

STATEMENT OF THE CASE

This case involves the scope and application of *United States v. Salerno*, 481 U.S. 739 (1987). The court below held that the rule announced in *Salerno* — that a party raising a facial challenge "must establish that no set of circumstances exists under which the [challenged statute] would be valid," *id.* at 745 — is merely a rule of third-party standing that does not apply when a plaintiff association purports to seek relief only on behalf of its members. With that justification, the Fifth Circuit allowed the plaintiff association in this case to challenge the validity of a Texas video franchising statute in all its applications

to all the association's members even though the association had not — and could not have — alleged that the statute is unlawful in all applications to the association's members. The Fifth Circuit's decision conflicts with decisions of the Second and Eleventh Circuits, which have held that *Salerno* requires an association launching such a challenge to allege that a statute is unlawful in all applications to all its members.

A. Municipal Franchising And Congress's Efforts To Promote Video Competition

1. From the early years of cable television, local franchising has operated as a barrier to entry. Franchising authorities "quickly understood that if just one franchise were granted, it would be a valuable commodity for which the city could obtain a high price." James C. Goodale, *All About Cable: Legal and Business Aspects of Cable and Pay Television* § 4.02[1] (rev. ed. 2006). For that reason, cable franchises were typically granted on an exclusive basis, and franchising authorities demanded correlative payments or other benefits from a franchisee. *See id.* Because franchising authorities generally lacked "established or uniform decision-making criteria," the franchising process was "relative chaos." *Id.*

Congress first addressed cable franchising in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act"). The 1984 Cable Act provided that "franchising authorit[ies]" — defined as the "governmental entit[ies] empowered by Federal, State, or local law to grant a [cable] franchise," 47 U.S.C. § 522(10) — may award "1 or more" franchises to cable operators for their provision of cable services, but must do so in accordance with requirements set out in the 1984

Cable Act. *See id.* §§ 541-547. Moreover, the 1984 Cable Act preempted state or local franchising laws or requirements that are inconsistent with federal communications law. *See id.* § 556(c).

One of Congress's stated goals in enacting the 1984 Cable Act was to "promote competition in cable communications and minimize unnecessary regulation." *Id.* § 521(6). Yet, as the Federal Communications Commission ("FCC") found, local franchising, even as constrained by the 1984 Cable Act, contributed to the lack of competition by establishing legal exclusivity and imposing entry requirements that were sustainable only for a monopoly operator.[1]

Congress adopted a different approach to local franchising in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act"). The 1992 Cable Act prohibited franchising authorities from awarding an "exclusive franchise" for cable service or "unreasonably refus[ing] to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). Congress also codified factors on which franchising authorities could and could not rely in refusing to grant a franchise application. *See id.* § 541(a)(4).

2. Despite Congress's market-opening efforts, incumbent cable operators still face only limited competition. Although cable operators can avoid rate regulation of their basic service tier if they obtain a determination by the FCC that they are subject to "effective competition," 47 U.S.C. § 543(a)(2), (*l*)(1), less than 4% of cable systems in the United States

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[1] *See* Report, *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, ¶¶ 134-135, 141-142 (1990).

have persuaded the FCC that they face such competitive pressure, *see* Report on Cable Industry Prices, *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 21 FCC Rcd 15087, ¶ 3 (2006) (cable operators face effective competition in 1,128 communities, while 31,655 communities lack such competition).

In the absence of competition, cable incumbents have consistently raised rates. Cable prices on the whole increased more than 5% in 2005 and by 93% in the preceding decade. *See id.* ¶ 2. Prices for the commonly sold "expanded basic" cable service increased twice as fast as inflation. *See id.* As the FCC recently summarized, "[m]ost communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service." *Section 621 Order*[2] ¶ 19. This continuing "dearth of competition is due, at least in part, to the [local] franchising process." *Id.* ¶ 20.

The FCC has observed, however, that a number of States, including Texas through the legislation at issue in this case, have reformed the franchising process in their States. Such "state level franchising," the FCC has concluded, "may provide a practical solution to the problems that facilities-based entrants face when seeking to provide competitive services on a broader basis than county or municipal boundaries and seek to provide service in a significant number of franchise areas." *Id.* ¶ 14 n.38.

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[2] Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2007) ("*Section 621 Order*").

B. The Texas Legislature's Efforts To Promote Video Competition

This case involves a challenge to Texas's precedent-setting franchising reform statute. Prior to the enactment of that statute, Texas vested cable franchising authority in individual municipalities. *See* Tex. Transp. Code Ann. § 311.071(a); Tex Util. Code Ann. § 181.102. Under the municipal franchising process, a new cable entrant was forced to engage in costly and time-consuming negotiations with each municipality in which it wanted to provide cable service. If the new entrant wanted to offer cable service statewide, it would thus have to negotiate hundreds of municipal agreements. By 2005, this local franchising process had become the "biggest concern" of those in Texas who sought to promote video competition. Hearing Before Senate Chamber Comm., Bus. & Commerce Comm. at 5 (June 27, 2005) (Doc. No. 15,[3] Exh. 6) (statement of Snapper Carr, Legislative Counsel for Texas Municipal League).

The Texas Legislature responded by enacting Senate Bill 5 ("SB 5"). The Legislature had before it — "on [the] desk" of each legislator, *see* Hearing on Bill SB.21, at 2 (Sept. 27, 2005) (Doc. No. 15, Exh. 3) (statement of Rep. King) — a report documenting both the absence of video competition in Texas and the substantial benefits competition would bring. *See* Perryman Group, *An Assessment of the Impact of Competition in the Delivery of Wireline Video Services on Business Activity in Texas* (July 2005) ("*Perryman Report*") (Doc. No. 15, Exh. 4). The report confirmed that cable providers enjoy dominant market positions

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[3] "Doc. No. 15" refers to AT&T Texas's Motion To Dismiss (and attachments thereto) filed in the district court on November 10, 2005.

across Texas: "about 92% (684 out of 744) of the cable-served communities have only one available cable television operator." *Id.* at 8. The report noted that the minimal entry in Texas by existing competitive cable operators, known as "overbuilders," was consistent with national data. *Id.* The report identified municipal franchising as one reason for the dearth of competition. Local franchising, the report stated, contributed to a "cumbersome and inefficient market entry mechanism" that "precludes substantial and rapid investment by other wireline . . . providers." *Id.* at 12.

The Texas Legislature determined that state-level franchising would "give [consumers more] choices" in video services and "lower [cable] prices." Transcript of Proceedings Before the Texas Senate at 6 (Aug. 9, 2005) (Doc. No. 15, Exh. 5) (statement of Sen. Fraser). It created SB 5 to streamline the video franchising process under which cable operators and other video providers that require permission to use public rights-of-way may apply immediately to the Public Utility Commission of Texas ("Texas PUC") for a video franchise in service areas they designate. *See* Tex. Util. Code Ann. §§ 66.002(3) & (11), 66.003. Franchises are issued on an expedited schedule to eligible providers. *See id.* § 66.003(b). Once a video provider obtains a state franchise, it need not seek a municipal franchise for any service area covered by the state authorization. *See id.* §§ 66.003, 66.010.

In enacting SB 5, the Texas Legislature sought to balance the goal of promoting competition with municipalities' reliance on existing, voluntarily negotiated franchises. Such franchises typically provided for the payment of franchisee fees and the provision of other benefits (such as institutional network

support) to municipalities. To protect municipalities' reliance interests, SB 5 grandfathers existing agreements. SB 5 permits all new entrants in any service area — including providers that are incumbents elsewhere — immediately to apply for a state-issued franchise for that area. Under the grandfathering provision, however, an incumbent cable operator providing service under an existing municipal franchise agreement may obtain a state-issued franchise for the area covered by the existing franchise agreement only after the agreement expires (or is terminated by mutual agreement). *See id.* §§ 66.002(7), 66.004. Through that provision, much like a similar provision of the federal 1984 Cable Act, *see* 47 U.S.C. § 557(a), the Texas Legislature sought to ensure that disruption to municipalities would be kept to a minimum. *See* Transcript of Proceedings Before the Texas House of Representatives at 36 (Aug. 9, 2005) ("House Floor Debate") (Doc. No. 15, Exh. 7) (statement of Rep. King) (existing agreements were "grandfather[ed]" "to give . . . cities a comfort level and allow the process of deregulation to ease in for them").

The Texas Legislature reached a different conclusion with respect to existing overbuilders. The Legislature concluded, based on the legislative record before it, that the competitive characteristics of overbuilders resembled those of new entrants more than those of incumbents and that municipalities were less reliant on overbuilders' existing franchise agreements. The Legislature accordingly allowed overbuilders with less than 40% market penetration in a particular municipal franchise area to opt out of their existing municipal franchise agreement with that

municipality by January 2006. *See* Texas Util. Code Ann. § 66.004(b), (c).

C. The Proceedings Below

1. Respondent Texas Cable Association (formerly known as Texas Cable & Telecommunications Association) ("TCTA")[4] is a trade association representing incumbent cable operators in Texas. The day after SB 5 became law, TCTA initiated a facial challenge to the statute, claiming that, by allowing overbuilders but not incumbents to abrogate their existing agreements and to obtain immediately state-issued franchises, the statute "discriminates" in violation of federal statutory and constitutional law. First Am. Compl. ¶ 1 (Jan. 20, 2006). Central to its discrimination claim was TCTA's allegation that obligations imposed by state franchises are "less onerous than the burdens that municipal franchises generally impose on [incumbents]." *Id.* ¶ 22; *see id.* ¶¶ 20, 31.

TCTA seeks an across-the-board remedy that would allow "incumbent cable operators . . . to renounce their municipal franchises and apply for [state]-issued franchises." TCTA Br. in Opp. to Motions To Dismiss 13 (Jan. 17, 2006); *see id.* at 16-17 ("[T]he question is not whether there is a proper justification for moving franchising to the state level — the question is whether there is a proper justification for denying incumbent cable operators the same treatment as that available to entrants and overbuilders."). TCTA thus challenges SB 5's grandfathering provision on its face, seeking relief on behalf of all its members based on the words of the

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[4] Because the pleadings and decisions below refer to TCTA, petitioner will use that name for respondent throughout.

statute and without reference to any particular applications of the statute to any of its members.

AT&T Texas moved to dismiss TCTA's complaint on the ground that the facial challenge could not withstand scrutiny under *Salerno*. In particular, AT&T Texas argued that TCTA's core legal theories rested on a premise — that SB 5 imposes a greater burden on incumbent cable operators than on overbuilders — that was not true in all cases. In particular, TCTA's own complaint and the record before the Texas Legislature establish that incumbents' existing municipal franchises are *not* universally more burdensome than state-issued franchises. *See* AT&T Texas Mot. To Dismiss 19-20 (Nov. 10, 2005). In many parts of Texas, moreover, incumbents face no competition from any video provider, even after the enactment of SB 5, and there is consequently no overbuilder against which a TCTA member competes. In those areas, SB 5 could not plausibly be said to "discriminate" unlawfully between the incumbent and its competitors. *See id.* at 20. Because TCTA had not alleged and could not allege that SB 5 was unlawful in all its applications to all TCTA members, AT&T Texas argued that TCTA's facial challenge could not proceed.

The district court granted AT&T Texas's motion to dismiss. *See* Pet. App. 25a-26a. Applying the standard announced in *Salerno* — that a facial challenge requires a plaintiff to show that all applications of a statute are unlawful — the district court held that TCTA had not stated a proper facial challenge because TCTA did not allege that SB 5 disadvantaged incumbent cable operators in all applications. *See id.* at 25a. The court further held that TCTA lacked standing to pursue its claims because it had not

alleged "any concrete cognizable harm suffered by any of its members." *Id.* The court dismissed TCTA's claims without prejudice, permitting TCTA or any of its members to bring a new action if they could allege concrete harm resulting from specific applications of the statute.

2. The Fifth Circuit reversed. After concluding that TCTA had standing, the court rejected AT&T Texas's argument that TCTA's complaint failed to allege that SB 5 was unlawful "in every application," and thus could not satisfy *Salerno*'s standard. Pet. App. 16a n.4. Citing the plurality opinion in *City of Chicago v. Morales*, 527 U.S. 41 (1999), in which three members of this Court questioned *Salerno*, the Fifth Circuit held that the rules relating to facial challenges are merely a "species of third party . . . standing" that apply only when a party seeks to vindicate the rights of third parties not before the court. Pet. App. 16a n.4 (internal quotation marks omitted). Having narrowly defined when the "every application" standard of *Salerno* is applicable, the Fifth Circuit concluded that the standard was not controlling in the posture of this case because "TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court." *Id.* The Fifth Circuit thus merged the question whether TCTA could pursue a facial challenge with the question whether TCTA had "associational standing." *Id.* ("[t]he proper inquiry is therefore one of associational standing"). Because, in its view, TCTA had adequately alleged associational standing, the court held that AT&T Texas's *Salerno* argument "lack[s] merit" and that TCTA's facial challenge to SB 5 should not have been dismissed. *Id.*

The Fifth Circuit denied AT&T Texas's petition for en banc review.

REASONS FOR GRANTING THE PETITION

This Court's precedent establishes that *Salerno*'s no-set-of-circumstances standard applies when an association seeks broad invalidation of a statute on behalf of its members, no less than when it invokes the rights of third parties not before the court. The Fifth Circuit's contrary holding divides the courts of appeals: the Second and Eleventh Circuits have squarely held in analogous circumstances that, under *Salerno*, an association may pursue a facial challenge only if it alleges that all applications of the challenged law to its members are unlawful.

This circuit split is of substantial jurisprudential and practical importance. By relaxing the standards for an association to pursue a facial challenge, the Fifth Circuit's decision will encourage associational suits as a means of circumventing the strictures of *Salerno*, thereby undermining the important principles of judicial restraint furthered by that decision. This Court's review is needed to resolve the conflict among the circuits on this important legal issue that lies at the core of the relationship between judicial and legislative bodies.

I. THE COURTS OF APPEALS ARE DIVIDED ON THE APPLICATION AND VITALITY OF *SALERNO*'S LEGAL STANDARD

In holding that TCTA could maintain a facial challenge to SB 5 on behalf of it members even though TCTA had not alleged that all applications of SB 5 to its members are unlawful, the Fifth Circuit created a sharp split with decisions of the Second and Eleventh Circuits. Certiorari is warranted to resolve the divide

in the courts of appeals and to address continuing confusion concerning the scope and vitality of this Court's decision in *Salerno*.

A. The Decision Below Conflicts With Decisions Of The Second And Eleventh Circuits

The court of appeals held that TCTA could maintain a facial attack on SB 5 notwithstanding that TCTA did not, because it could not, allege that all applications of SB 5 to its members are unlawful. Based on its reading of the plurality opinion in *Morales*, the Fifth Circuit reasoned that the rule of *Salerno* was not relevant because "TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court." Pet. App. 16a n.4.[5]

That holding puts the Fifth Circuit in conflict with the Second and Eleventh Circuits, each of which has held that *Salerno* precludes a facial challenge when an association seeking relief on behalf of its members does not allege that all applications of the challenged statute to its members are unlawful.

In *Rent Stabilization Association v. Dinkins*, 5 F.3d 591 (2d Cir. 1993), an association of building owners,

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[5] The Fifth Circuit's narrow view of *Salerno* is not an isolated phenomenon. The Ninth Circuit has likewise read *Morales* to suggest that "the *Salerno* rule" is "a species of third-party standing"; unlike the Fifth Circuit, however, the Ninth Circuit elected to follow *Salerno*'s no-set-of-circumstances formulation "[u]ntil a majority of the Supreme Court directs otherwise." *Hotel & Motel Ass'n v. City of Oakland*, 344 F.3d 959, 971, 972 (9th Cir. 2003). In addition, the Sixth Circuit has suggested, again in dicta, that "facial challenges are normally rejected because a person to whom the statute may be constitutionally applied may not challenge the statute on behalf of third parties." *Simon v. Cook*, 261 F. App'x 873, 883 (6th Cir. 2008).

"on behalf of its members," challenged New York City's rent-stabilization rules on the basis that they effected an unconstitutional taking. *Id.* at 592-93. The association sought "declaratory and injunctive relief from [the city's] rent stabilization scheme" only "on behalf of its members," not, for example, on behalf of all landlords in New York City affected by the regulations. *Id.* at 592.

Applying *Salerno*, the Second Circuit held that, to maintain such a facial challenge, the association needed to establish that "no set of circumstances exists under which the challenged act would be valid." *Id.* at 595 (internal quotation marks, brackets, and emphasis omitted). The court of appeals held the association could not carry that burden. The association's allegation that "'*many*'" of its members "are victims of a taking" implicitly conceded that the challenged rules "ha[d] not abridged the constitutional rights of those landlords who *do* obtain an adequate return." *Id.* The court held that, "far from alleging" the New York rules "act unconstitutionally in every circumstance," the complaint's allegations made clear that "takings occur in only limited subcategories of possible circumstances." *Id.* Consequently, the Second Circuit explained, "the proper recourse is for the aggrieved individuals themselves to bring suit." *Id.* (internal quotation marks omitted).

The Eleventh Circuit likewise applied *Salerno* to bar a facial challenge brought by an association on behalf of its members. In *Georgia Cemetery Association, Inc. v. Cox*, 353 F.3d 1319 (11th Cir. 2003) (per curiam), an association of cemetery owners brought, among other claims, a constitutional takings claim against the Georgia Cemetery and Funeral Services Act of 2000. The Georgia statute "set[] a $50 fee

limit for both the transfer of burial rights from one purchaser to another and assisting in the 'sitting' of a monument on a burial plot." *Id.* at 1320. The association "assert[ed], on behalf of its members, that the [state statute] ... unconstitutionally prevent[ed] its members from contracting to establish a price greater than $50 to site a monument on the lot on which it is to be installed in its members' cemeteries and from contracting to establish a price greater than $50 to transfer burial rights." *Id.* at 1322.

Though the plaintiff association sought relief only "on behalf of its members," the Eleventh Circuit invoked the standard of *Salerno* that a "'challenger must establish that *no set of circumstances exists* under which the Act would be valid.'" *Id.* (quoting *Salerno*, 481 U.S. at 745). The association's challenge failed to meet that standard. The Eleventh Circuit reasoned that "there would be no taking from a Georgia private cemetery that does not charge greater than $50 for the transfer of burial rights from one individual to another or for a monument siting." *Id.* "Under those circumstances," the Eleventh Circuit explained, "there would not be grounds for alleging an unconstitutional taking as to *all* of its members." *Id.* (emphasis added). Accordingly, the association's facial challenge on behalf of each of its members did not succeed "because the economic impact of these provisions will vary depending upon the economic circumstances of each of its members." *Id.*

The decisions of the Second and Eleventh Circuits teach that *Salerno* applies even when an association seeks relief only on behalf of its members. Both courts held, contrary to the Fifth Circuit's decision in this case, that an association in such circumstances

carries the burden of pleading and proving that *all* applications of the challenged law *to its members* are unlawful. If this case had arisen in the Second or Eleventh Circuits, TCTA would not have been able to evade *Salerno*'s standard by seeking relief exclusively on behalf of its members and forswearing any claim for relief on behalf of third parties.[6]. Rather, the inquiry would have been whether TCTA had sufficiently alleged that all the applications of SB 5 to its members are unlawful. Because, as discussed below, TCTA did not make — and cannot make — that essential allegation, the Fifth Circuit's split with the Second and Eleventh Circuits on the applicability of *Salerno* is outcome-determinative.

This Court's review is thus warranted to secure uniformity in the application of *Salerno*'s no-set-of-circumstances rule to a facial challenge brought by an association on behalf of its members.

B. The Decision Below Deepens Confusion In The Federal Courts Regarding *Salerno*

Apart from the question of *Salerno*'s applicability to associational challenges, the decision below adds to the confusion among the federal courts on the threshold question whether *Salerno* remains good law. The centerpiece of AT&T Texas's presentation below was *Salerno*'s no-set-of-circumstances standard. TCTA, in turn, suggested that *Salerno* is not controlling in light of the plurality opinion in *Morales*.[7] Following TCTA's lead, the Fifth Circuit

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[6] *See* TCTA C.A. Reply Br. 16-17 (arguing that *Salerno* is "[i]napplicable" because "TCTA does not seek relief going beyond its members").

[7] *See* TCTA C.A. Reply Br. 8 & n.18 (relying on plurality in *Morales* rather than *Salerno*); *id.* at 18 & n.47 (arguing that *Salerno* does not apply to equal-protection claims); TCTA Br. in

turned to the plurality in *Morales* for guidance and declined to apply the legal standard articulated in *Salerno*. *See* Pet. App. 16a n.4.

The Fifth Circuit's decision to disregard *Salerno* in favor of *Morales* deepens confusion in the courts of appeals regarding the vitality of *Salerno*. As the Ninth Circuit has explained, "[j]urisprudence appears to be divided on the question whether the *Salerno* 'no set of circumstances' standard is dicta or whether it is to be generally applied to facial challenges." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007). Indeed, numerous courts of appeals have expressed uncertainty concerning the extent to which *Salerno* remains controlling law. *See, e.g.*, *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008) ("Justices of the Supreme Court disagree about the correctness of *Salerno*'s statement that a facial challenge is impossible unless 'no set of circumstances exists under which the Act would be valid'"); *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1157 n.5 (10th Cir. 2006) (the Supreme Court "has been less than clear as to what a party must show in order to succeed" in the posture of a "facial challenge"); *Rothe Dev. Corp. v. Department of Defense*, 413 F.3d 1327, 1337 (Fed. Cir. 2005) (*Salerno* "has been criticized in several subsequent Supreme Court cases," but "the *Salerno* language has not been expressly disapproved by the Supreme Court"); *United States v. Rybicki*, 354 F.3d 124,

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Opp. to Motions To Dismiss 26 & n.111 (citing *Morales* for the view that *Salerno* may not be "apposite" or "good law"); Dist. Ct. Motions Hearing Tr. 69:22-24 (May 22, 2006) ("We don't know if [the no-set-of-circumstances standard is] actually the right standard. It's the standard that comes from a case, *United States versus Salerno*, which has been subject to some criticism.").

131 (2d Cir. 2003) (en banc) (refusing to follow the *Morales* plurality's construction of facial-challenge doctrine because "a majority of the Supreme Court has not" voted to reexamine *Salerno*).

This Court's review is therefore independently warranted to resolve this continuing confusion over whether and to what extent *Salerno* remains good law in the wake of this Court's fractured decision in *Morales*. *Cf. Nichols v. United States*, 511 U.S. 738, 746 (1994) ("confusion following a splintered decision [of this Court] is itself a reason for reexamining that decision").

II. THE FIFTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND WITH THE PURPOSES UNDERLYING FACIAL-CHALLENGE RULES

The divide among the courts of appeals and the confusion in federal courts regarding *Salerno* are more than sufficient to warrant this Court's review. Plenary review in this case is particularly appropriate, however, because the Fifth Circuit's decision is wrong: it conflicts with decisions of this Court and undermines the purposes served by limits on facial challenges.

A. The Decision Below Conflicts With Decisions Of This Court

This Court stated in *Salerno* that "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully" because "the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745; *see Keyishian v. Board of Regents*, 385 U.S. 589, 594-95 (1967) (facial challenge cannot succeed when a statute is "capable of constitutional applica-

tion"). This standard reflects the view that as-applied challenges are the preferred course of constitutional adjudication and that "facial challenges are best when infrequent." *Sabri v. United States*, 541 U.S. 600, 608 (2004). *Salerno*'s standard further reflects the principle that courts should not "nullify more of a legislature's work than is necessary" and should "enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006).

The decision below cannot be reconciled with those principles. *See* Pet. App. 16a n.4. Under *Salerno*, to proceed with a facial challenge on behalf of its members, TCTA must allege that SB 5 is unlawful in all applications to TCTA's members. That, in turn, requires TCTA to plead that all applications of SB 5 disadvantage TCTA's members. TCTA did not and cannot satisfy that standard.

First, TCTA failed to plead that SB 5 disadvantages its members in all applications; rather, even after amending its complaint, the most that TCTA could allege is that *some* municipal franchises are more onerous than state-level franchises. *See* First Am. Compl. ¶ 22 (municipal franchises "*tend* to be lengthy and comprehensive"; SB 5 franchises are "less onerous than the burdens that municipal franchises *generally* impose on cable operators") (emphases added). Those heavily qualified allegations show that TCTA is not alleging that *all* existing municipal franchises are more onerous than SB 5 franchises. Indeed, TCTA's allegations are, for present purposes, indistinguishable from those at issue in *Dinkins*, which the Second Circuit found were tantamount to a concession that not all applications of the New York

City rent-stabilization rules were unlawful. *See* 5 F.3d at 595.

The legislative record demonstrates *why* TCTA has not alleged that SB 5 burdens all its members in every application. The legislative debate on SB 5 revealed that the terms of some municipal franchise agreements — especially those negotiated with rural municipalities — are less burdensome for the cable operator than are the terms of an SB 5 franchise. Representative Gattis, for example, explained that towns in his legislative district had agreed with their incumbent cable operator on franchise fees that, at 3% of gross revenues, are substantially lower than the 5% of gross revenues franchisees must pay under SB 5. *See* Texas House Debate at 41-43; *id.* at 39 (statement of Rep. King) (noting that Weatherford has a municipal franchise agreement with a 4% gross revenue fee); *id.* at 48 (statement of Rep. Gattis) (franchise fee in Cameron is 3% of gross revenues); Tex. Util. Code Ann. § 66.005(a) (5% fee for state-issued franchises). In these circumstances, the Texas Legislature's failure to give TCTA's members the right to abrogate existing agreements — in order to opt-in to a state-issued franchise that would charge the incumbent a substantially higher franchise fee — could not possibly disadvantage the incumbents in any legally cognizable manner.[8]

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[8] TCTA's contention that "all of its members are prepared to seek state-level franchises," Pet. App. 12a, does not alter this analysis. TCTA never alleged that each of its members *in each franchise area* would abrogate municipal franchises if afforded the chance. The most that TCTA could allege, even after amending its complaint, was that each of its members would renounce at least one, but not all, franchises. *See* First Am. Compl. ¶ 28.

Second, the legislative record showed that, in many parts of Texas, incumbents face no prospect of competition under SB 5, either from overbuilders or from new entrants. *See Perryman Report* at 7-8. The central theory of TCTA's case is that the Texas Legislature unlawfully treats incumbents differently from overbuilders. *See supra* p. 8. Yet TCTA seeks an across-the-board remedy that would allow incumbents to abandon their franchise agreements *everywhere* in the State — based on purportedly discriminatory treatment of incumbents and overbuilders — even in municipalities where no overbuilders exist.

This Court's precedent forecloses such an expansive claim for relief. In *Ayotte*, this Court explained that, "when confronting a constitutional flaw in a statute, [a court must] try to limit the solution to the problem." 546 U.S. at 328. Courts should accordingly "enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Id.* at 328-29. That presumption against broad invalidation rests on the precept that a court should not "nullify more of a legislature's work than is necessary," and thus "the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* at 329 (internal quotation marks omitted; ellipsis in original).

Ayotte controls the outcome here. TCTA's attempt to invalidate SB 5's grandfathering provision across the board — even in areas of Texas where TCTA's members are unaffected by, or benefit from, SB 5 — is contrary to the teaching of *Salerno* and *Ayotte* that only unlawful applications of a statute should be remedied. For these reasons, the Fifth Circuit's

rejection of AT&T Texas's objections to TCTA's facial challenge as "lack[ing] merit" cannot be reconciled with this Court's decisions. Pet. App. 16a n.4.

B. The Fifth Circuit Erred In Concluding That *Salerno*'s Standard Is Nothing More Than A Limit On Third-Party Standing

The Fifth Circuit allowed TCTA to maintain a facial challenge to SB 5 solely because "TCTA is only asserting the interests of its members . . . , rather than the interests of third parties." Pet. App. 16a n.4. The upshot of the Fifth Circuit's decision is that *Salerno*'s standard is irrelevant on a motion to dismiss so long as a plaintiff association does not invoke third-party rights, no matter how broadly the plaintiff frames its challenge or the requested relief. That understanding of *Salerno* is deeply flawed.

Salerno's no-set-of-circumstances standard is more than a rule of third-party standing. The rule operates to limit the scope of any challenge that a plaintiff may bring against a statute: if there are instances in which a statute can be applied lawfully, then a broad, across-the-board challenge to the statute must fail. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) ("to prevail on a facial attack the plaintiff must demonstrate that the challenged law . . . could never be applied in a valid manner") (internal quotation marks omitted); *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 469 (7th Cir. 2002) (when court can "envision several scenarios" where statute is lawful, "facial attack" must "fail[]"); *Sanitation & Recycling Industry, Inc. v. City of New York*, 107 F.3d 985, 994 (2d Cir. 1997) (law phasing out contracts was not facially invalid because, "in some cases, *e.g.*, those where the contract is about to expire . . . , the impairment caused

by the law will be slight"; court thus could not "conclude that the statute may not under any circumstances be found constitutional"). Relief must instead be sought on an individualized basis, challenging only those applications of the law that (on the plaintiff's own theory) are unlawful.

That a party has not invoked the rights of third parties (and thus disclaims a challenge to a certain subset of a statute's applications) does not render *Salerno*'s standard inoperative. Rather, *Salerno* applies when a plaintiff seeks to invalidate all applications of a statute to itself (or to its members, as TCTA does here) no less than when it seeks to invalidate all applications of a statute to third parties.[9] TCTA therefore may not maintain a challenge to *all* applications of SB 5's grandfathering provision to *each* of its members in *every* municipality across Texas if there are some applications of the statute to some of TCTA's members in some municipalities that are lawful. It is irrelevant to that analysis that TCTA is not seeking relief on behalf of parties other than its own members.

The Fifth Circuit's contrary rule would frustrate the purpose of limiting facial challenges. This Court has recently emphasized the "disfavored" nature of facial challenges, explaining that "[c]laims of facial

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[9] *See, e.g.*, *Arriaga v. Mukasey*, 521 F.3d 219, 224 n.2 (2d Cir. 2008) (facial challenge fails where party "cannot establish that the statute is vague in his own case"); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1078 (D.C. Cir. 2003) (rejecting facial challenge where plaintiff's "own case represents a 'set of circumstances' under which the [statute] may constitutionally be applied"); *Dinkins*, 5 F.3d at 592-93; *see also Morales*, 527 U.S. at 80 n.3 (Scalia, J., dissenting) (under *Salerno*, plaintiff must show infringement of all "third-party rights" "in addition to" all of "[plaintiff's] own rights").

invalidity often rest on speculation" and thus invite "premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (internal quotation marks omitted). "Facial challenges," moreover, "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotations marks omitted). In addition, decisions based only on the "facial requirements" of a statute mean that adjudication occurs in a vacuum before a State has had an "opportunity to implement [a statute], and its courts have had . . . occasion to construe the law in the context of actual disputes." *Id.* at 1190.

TCTA's suit implicates all those concerns. As the district court correctly concluded, TCTA seeks broad invalidation of a state statute on its face. *See* Pet. App. 23a-25a ("TCTA's claims cannot be considered by the Court until TCTA can present a specific controversy for judicial resolution" because the court would otherwise be called upon to "frustrate the expressed will of a state legislature" based only on "hypothetical cases"). Further, TCTA seeks a windfall remedy that would allow each of its members to abrogate their existing municipal franchise agreements — subverting the Texas Legislature's efforts to balance the goal of promoting video competition and the need to protect municipalities' reliance interests — even in areas of Texas where TCTA's members cannot plausibly claim to be disadvantaged by SB 5. TCTA's proposed remedy is thus inconsistent

with the principle that courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte*, 546 U.S. at 328-29; *see Washington State Grange*, 128 S. Ct. at 1191 ("facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution").

III. THE LEGAL ISSUE RAISED BY THE PETITION IS IMPORTANT AND IS PROPERLY ADDRESSED NOW

A. The legal issue raised in this petition has profound jurisprudential and practical importance. *Salerno* and other limits on facial challenges provide crucial restraints on the ability of the federal judiciary to disrupt the acts of legislative bodies. *See* Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 361 (1998) (facial challenges invite a "robust role for the federal courts in reviewing legislative enactments," in "substantial tension with core principles underpinning Article III courts that require resolution of concrete disputes, general deference to the legislative process, and determination of constitutional questions as a matter of last resort and on a limited basis"). This Court has recently identified the significant interests served by limiting the instances in which parties may seek broad judicial remedies that would nullify legislative acts. *See Washington State Grange*, 128 S. Ct. at 1191. In light of those structural interests served by *Salerno*'s standard and the rules governing facial challenges, clarity with respect to the scope and application of these rules is imperative.

Every constitutional challenge to a state or federal statute is potentially implicated by *Salerno*'s rule that a facial challenge may not succeed unless there is "no set of circumstances . . . under which the [statute] would be valid." 481 U.S. at 745. Potential litigants have a significant interest in knowing the burdens they will shoulder should they choose to pursue facial claims. *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1334-35 (2005) ("[f]acial and as-applied challenges present drastically different ways of enforcing constitutional rights," and the "differences" between the challenges "have enormous practical significance" for litigants). This Court's review would thus bring clarity to questions that have a practical effect on litigation across the country.

Beyond that, a reading of *Salerno* that limits it to a rule of third-party standing renders associational facial challenges a far more attractive vehicle for attacking a statute's validity. If an individual member of TCTA brought a challenge to SB 5 seeking to abrogate an existing municipal franchise agreement, that challenge would fail at the threshold if the incumbent were unable to allege that it faced competition in the municipality at issue and that it would be worse off under its existing agreement than it would be under SB 5. In this case, however, TCTA seeks to obtain for that same incumbent identical relief through an associational facial challenge that, under the Fifth Circuit's decision, requires no such allegation of competition or relative burden. Allowing parties to obtain through associational challenges what they cannot obtain through individual challenges not only defies common sense, but also will encourage litigants to bring constitutional challenges to state

and federal statutes as all-encompassing associational facial challenges — a result at odds with the principle that adjudication is best when it addresses particular, concrete applications of law. *See United States v. Raines*, 362 U.S. 17, 20-22 (1960); *Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912).

Finally, this Court's review is necessary because the question presented will not resolve itself. The issue has already divided the courts of appeals, and it is unlikely to be resolved absent intervention by this Court in view of the federal courts' professed inability to resolve the meaning of *Salerno* in the wake of both the *Morales* plurality and continuing criticism of *Salerno*'s legal standard. *See* pp. 15-17; *Washington v. Glucksberg*, 521 U.S. 702, 739-40 (1997) (Stevens, J., concurring in the judgment) (suggesting this Court has never followed *Salerno*, not even in *Salerno*).

B. This is an appropriate vehicle to resolve the question presented. The case squarely presents the issue, which is a pure question of law that involves, among other things, interpretation of *Salerno* and the fractured opinions in *Morales*. The legal question, moreover, was fully briefed before the district court and the court of appeals, and was passed upon by both lower courts.

The interlocutory nature of the court of appeals' decision does not weigh against this Court's review. Where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern *et al.*, *Supreme Court Practice* 259 (8th ed. 2002).

Indeed, this Court often grants certiorari to review interlocutory decisions addressing important threshold issues. *See, e.g., Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).[10] Given the dispositive nature of AT&T Texas's challenge to TCTA's facial attack on SB 5's grandfathering provision, and because the question presented will affect significantly the manner in which further proceedings are conducted, resolution of this important question need not and should not wait.[11]

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[10] The unpublished nature of the Fifth Circuit's decision is likewise no bar to this Court's review. *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (noting that this Court "granted certiorari" to review "an unpublished disposition" by the Sixth Circuit); *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., joined by O'Connor & Souter, JJ., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit[.]"). That is particularly so given that the Fifth Circuit's decision may well have pernicious effects outside the Fifth Circuit. *See* Fed. R. App. P. 32.1; 5th Cir. R. 28.7.

[11] Upon remand to the district court after the Fifth Circuit's decision, Time Warner Cable was added as a plaintiff. Plaintiffs have asserted that this addition moots facial-challenge issues. That is incorrect. The Second Amended Complaint contains the same substantive allegations as the other complaints: even with Time Warner Cable in the case, for example, TCTA continues to seek a broad judicial decree that would apply in municipalities across Texas without regard to the actual burdens faced by incumbents in each municipality. Furthermore, the new complaint does not allege that SB 5's grandfathering provision imposes discriminatory burdens in all its applications *even* as to Time Warner Cable itself. As explained, an individual plaintiff cannot secure relief in municipalities where it is not harmed by or is better off under SB 5. *See supra* p. 25. Even with respect to Time Warner Cable, then, the complaint

IV. ALTERNATIVELY, THE COURT SHOULD VACATE AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *WASHINGTON STATE GRANGE*

For the reasons stated above, this Court's plenary review is warranted. In the alternative, this Court should grant the petition, vacate the court of appeals' judgment, and remand for further consideration in light of the Court's recent decision in *Washington State Grange*.

In *Washington State Grange*, this Court — while noting that *Salerno*'s precise standard has been criticized — emphasized that "all [members of the Court] agree that a facial challenge must fail where the statute has a plainly legitimate sweep." 128 S. Ct. at 1190 (internal quotation marks omitted). Even that consensus standard for measuring facial challenges compels dismissal of TCTA's complaint, because there are "plainly" instances in which SB 5's grandfathering provision may be "legitimate[ly]" applied to TCTA's members. Those circumstances include instances both in which an existing agreement is more favorable to the incumbent than an SB 5 franchise would be and in which a TCTA member faces no competition from an overbuilder in a municipality in which it operates under a local franchise agreement. *See supra* pp. 18-21. Those lawful applications of SB 5's grandfathering provision prevent TCTA as a matter of law from maintaining a challenge to all applications of SB 5 to each of its members. Under the guidance provided by this Court in *Washington State Grange*, those applications of SB 5 suffice to show

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does not satisfy *Salerno*'s requirement that a plaintiff raising a facial challenge allege that there are no lawful applications of the statute to itself.

that SB 5 has a "plainly legitimate sweep" and thus that TCTA's facial challenge on behalf of each of its members must fail. *See also Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (plurality) ("[a] facial challenge must fail where the statute has a plainly legitimate sweep") (internal quotation marks omitted).

Washington State Grange also makes clear that facial-challenge rules serve as more than restrictions on third-party standing, thus directly contradicting the Fifth Circuit on this point. *See* Pet. App. 16a n.4. This Court held that facial challenges are disfavored "for several reasons," including because they require courts to "anticipate a question of constitutional law in advance of the necessity of deciding it" and to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." 128 S. Ct. at 1191 (internal quotation marks omitted); *see supra* pp. 22-23. Those rationales go well beyond, and indeed have nothing to do with, concerns about litigants raising the rights of third parties. Because the Fifth Circuit's decision rests on a different (and narrower) understanding of the purposes of limits on facial challenges, this intervening decision undermines the basis for the decision below. In these circumstances, the Court should at a minimum grant the petition, vacate the judgment below, and remand for further consideration.

CONCLUSION

The Court should grant review of the Fifth Circuit's judgment. In the alternative, the petition should be granted, the court of appeals' judgment should be vacated, and the case should be remanded for further consideration in light of *Washington State Grange*.

Respectfully submitted,

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June 12, 2008

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-51514

TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION,
Plaintiff-Appellant,

v.

PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS; JULIE PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS; BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS,
Defendants-Appellees,

AND

TEXAS COALITION OF CITIES FOR UTILITY ISSUES; GTE SOUTHWEST INC. D/B/A VERIZON SOUTHWEST; SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS; GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor Defendants-Appellees.

Feb. 7, 2008

Appeal from the United States District Court for the Western District of Texas, USDC No. 1:05-CV-721.

Before JOLLY, DAVIS, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

The Texas Cable & Telecommunications Association ("TCTA"), on behalf of its member cable providers, filed suit challenging a statute recently enacted by the Texas legislature that was intended to reform the cable service industry in the state. The TCTA claimed the statute was unconstitutional primarily because it unjustifiably discriminated against its members, who are incumbent cable providers, in favor of those providers who would now be permitted to enter the market under the new statutory scheme. Furthermore, the TCTA also alleged that the Texas statute violated the Supremacy Clause. The district court dismissed the complaint under Rule 12(b)(6), Fed.R.Civ.P., holding that the TCTA lacked standing because no discernable injury had occurred and that the case was not yet ripe for litigation. The TCTA appeals that dismissal. We hold that the TCTA's complaint adequately alleges Article III standing to survive a Rule 12(b)(6) motion. The district court therefore erred in dismissing the complaint, requiring that we therefore REVERSE and REMAND for such further proceedings as are appropriate.

I.

This case arises from an effort by the Texas legislature to overhaul the regulation of the cable industry and video programming in the state. Understanding

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

this effort requires some description of the system that the legislature sought to replace.

A variety of different groups compete to bring video programming to Texas communities. Many communities have a single "incumbent" cable operator, often the operator that first introduced cable services to that community. These cable operators now face direct competition from overbuilders – companies that build cable systems in areas that are already served by another cable operator – and from telephone companies attempting to expand into new markets.

All of these cable providers – incumbents, overbuilders, and telephone companies – must use public rights of way to install their equipment. In order to use these public facilities, the original cable providers in a community had to seek the permission of municipalities before constructing their cable systems. This permission took the form of "franchise agreements," long-term contracts with municipalities in which cable operators were allowed to build their systems in exchange for extensive municipal regulation, including the payment of fees.

The terms of the franchise agreements came under federal regulation in 1984, when Congress added Title VI to the Federal Communications Act. Title VI allows these franchise agreements, but requires that the franchise agreements meet certain federal standards. A franchising authority must assure, for example, that franchisees do not deny cable services to potential subscribers based on the low income of the region in which the potential subscribers reside. Later amendments addressed competition. Franchising authorities are now prohibited from granting exclusive franchises to cable operators, many of

which had monopolies in their respective local markets. Congress also repealed a ban that prevented telephone service providers from entering the video services market. Although these measures encouraged competition in the cable industry, many cable operators in Texas still operated as monopolies in their respective franchise areas.

The growth of competition, that is, allowing new entrants into the municipal markets, was hindered because franchise agreements remained at the local, rather than state, level. A new entrant to the cable service market, such as a telephone company, would therefore have to negotiate separate contracts with each target municipality. The costs of negotiating these individual license agreements, and the potential for variance among them, led to the passage of the "Act Relating to Furthering Competition in the Communications Industry" ("the Act"), an amendment to the Texas Utility Code.

The Act creates a state (as opposed to a local) franchising process. A new entrant must first petition the Texas Public Utility Commission ("the PUC") for permission to operate in the communities it seeks to enter. If the new entrant is able to satisfy some very basic requirements, the PUC is obliged to grant the requested certificate of franchise authority for the market or markets applied for. Incumbent providers, however, are explicitly excluded from this process for the communities in which they operate and remain bound to their previous franchise agreements. On the other hand, overbuilders operating in the same market as the incumbent are allowed to terminate their municipal agreements in favor of the new state certification process. This disparate treatment of incumbents, as opposed to new entrants and over-

builders, led to the lawsuit at issue here. The TCTA, representing its members, filed suit the day after the passage of the Act, seeking to have the Act declared unlawfully discriminatory and to enjoin its enforcement.

II.

The TCTA claimed that the Act violated the United States Constitution in several respects. According to the TCTA, the Act's discrimination against its members by favoring new entrants and overbuilders is without reasonable justification, and consequently violates the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The TCTA further claimed that the Act is incompatible with various sections of the Federal Communications Act, and thus is in violation of the Supremacy Clause. Several interested parties intervened on behalf of the state defendants and filed motions to dismiss. The district court, largely on the strength of an in-court statement by the TCTA that "it's too soon to tell" what impact the Act will have on the profit of its members and competition among cable providers, found that each of the claims made by the TCTA were non-justiciable for lack of standing and ripeness. More specifically, the district court concluded that the TCTA failed to allege a concrete, cognizable injury suffered, or likely to be suffered, by any of its members and, moreover, had admitted that the time was not ripe for making such a determination. The district court therefore granted a rule 12(b)(6) motion to dismiss for failure to state a claim with respect to all defendants and intervenor-defendants. This appeal followed.

III.

The TCTA argues that it has alleged straightforward injuries that make its claims justiciable. The new regulatory structure created by the Act discriminatorily removes certain regulatory restrictions on potential competitors while leaving those restrictions in place with respect to incumbent cable providers; this competitive disadvantage to incumbent providers, it is argued, results in a justiciable economic injury, irrespective of whether the TCTA's members have actually yet faced the increased competition. Further, the TCTA argues that the statute's unreasonable categorization and consequent differing treatment of various service providers – new entrants and overbuilders against incumbents – alone constitutes a cognizable constitutional injury. And, concerning both injury and ripeness, the TCTA urges that it never made a general admission before the district court that its members had not yet suffered an injury. Instead, the TCTA contends that it only acknowledged that it is too soon to tell whether the injury will mean its member providers will have to operate at an actual deficit. Finally, with respect to ripeness, the TCTA points out that its various complaints about the Act are purely legal – no further factual development is necessary in order for the case to proceed.

A number of arguments supporting the district court's ruling, as well as alternative arguments, are advanced by various of the defendants. At the bottom of all of these, however, is the same complaint: lack of detail in the TCTA's allegations. The TCTA did not specify which of its members would be injured; nor did it allege the precise harms that its members would suffer under the Act. This lack of

specificity was construed by the district court – and is now argued by the defendants – to mean that the TCTA lacked standing because no one member of the TCTA is alleged to face an actual economic harm; the TCTA therefore could show no "concrete" injury. Moreover, this uncertainty about the precise effect that the Act would have on the TCTA's members led the district court to conclude that the TCTA had filed suit prematurely. Thus, the possibility that the Act had no effect on some of the TCTA's membership, and that it may not have economically disadvantaged all of those that it did affect, was sufficient reason to find justiciability lacking.

Several prospective competitors to the TCTA's members join in this argument, but along slightly different lines. Expanding on a brief statement made by the district court, they urge that the TCTA has challenged the Act on its face; as such, the TCTA must show not only that the Act is unconstitutional in all of its applications, but that it also has caused concrete injury in all of its applications. The argument continues, asserting that, because of the nature of the TCTA's claims, its failure to state the specific ways in which all or any of its members have been injured is fatal to a claim of standing.

Precisely the same considerations animate the challenge to the TCTA's assertion of associational standing. The Texas Coalition of Cities for Utility Issues ("TCCUI") argues that the TCTA lacks associational standing because the Act will have diverse effects on the TCTA's membership – some members will not be put at a disadvantage and those that are will be disadvantaged in widely varying degrees. As a result, the TCCUI claims that the participation of the TCTA's individual members is necessary to

resolve this case, and the TCTA thereby lacks standing to bring suit on behalf of a group with such diverse interests and alleged, but undetermined, injuries.

IV.

A.

The district court dismissed the TCTA's complaint for lack of standing under Rule 12(b)(6). Thus, as we have made clear, the precise and only issue before us is whether, for purposes of surviving a Rule 12(b)(6) motion, the plaintiffs have alleged grounds for standing. Dismissals under Rule 12(b)(6) are reviewed *de novo*. *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir.1997).

> A motion to dismiss under rule 12(b)(6) is viewed with disfavor and is rarely granted. The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. The district court may not dismiss a complaint under rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . . The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief.

Id. at 247 (internal citations and quotation marks omitted). We begin with the proposition that the Constitution of the United States limits the jurisdiction of federal courts to "Cases" and "Controversies." *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). A central element of this jurisdictional limitation is the doctrine of standing, which

"set[s] apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Standing ensures that a plaintiff has "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Accordingly, an association may appear as a plaintiff so long as it is asserting either its own interests as an association or by appearing "solely as the representative of its members." *Id.* at 511.

In order to have such representational standing, an association must satisfy three requirements: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Thus, because standing must exist independently among the association's membership, "representational standing . . . does not eliminate or attenuate the constitutional requirement of a case or controversy." *See Warth*, 422 U.S. at 511. The association must still show that "its members, or any one of them" have standing. *Id.*

The Supreme Court has "established that the irreducible constitutional minimum of standing contains three elements": injury-in-fact, causation, and redressability. *Lujan*, 504 U.S. at 560. Only injury-

in-fact is in dispute here. Though the terms used in defining an injury-in-fact are "concededly not susceptible of precise definition," *Allen*, 468 U.S. at 751, the plaintiff is required to show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted). What's more, "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 126 S.Ct. 1854, 1867, 164 L.Ed.2d 589 (2006).

B.

Before reaching the substantive issues related to standing, the procedural posture of this case – dismissal on the pleadings – requires some comment, for it informs the adequacy of the TCTA's claims for standing. The burden of establishing the elements of standing is on the party seeking jurisdiction in the federal courts. *Lujan*, 504 U.S. at 561. And "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Evidently then, the requirements of the plaintiff with respect to a motion to dismiss and an adversarial motion for summary judgment will be substantially different. Indeed, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)) (alteration in original). In

contrast, general allegations will not suffice for summary judgment; specific facts must be adduced instead. *See id.*

As in this case, the stage of litigation determined the standing analysis in *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). In *Bennett*, a number of plaintiffs objected to a biological opinion issued by the Fish and Wildlife Service. *Id.* at 157. That biological opinion, which was mandated by the Endangered Species Act of 1973, suggested that certain reservoirs maintain minimum water levels for the purpose of protecting indigenous species of life. *Id.* at 157-58. The plaintiffs complained that such minimum levels would diminish their use of the reservoirs for irrigation and other purposes, causing them injury. *Id.* at 160.

The government contended that the plaintiffs had no standing to bring such a suit. *Id.* at 161. Specifically, the government argued that the plaintiffs' allegations failed to satisfy the injury-in-fact element of standing "because they demonstrate only a diminution in the *aggregate* amount of available water, and do not necessarily establish . . . that *petitioners* will receive less water." *Id.* at 167. But the court, relying on *Lujan*, rejected this argument: "Given petitioners' allegation that the amount of available water will be reduced and that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners will be injured." *Id.* at 168. Because the facts necessary for the aggregate diminution of available water to harm the petitioners reasonably could be inferred, the court found the injury-in-fact standing requirement satisfied. *See id.*

This appeal presents an analogous situation. The TCTA has made general allegations of direct harm,

arguing that the Act singles out incumbent cable providers for treatment different from other parties. Perhaps most significantly, the TCTA contends that all of its members are prepared to seek state-level franchises if they are permitted to do so, indicating that the TCTA members consider the Act to be to their universal benefit (if they can be included). As in *Bennett*, then, the TCTA's complaint has not identified a specific member who will be injured by the government action. But these allegations, referring to the general membership, state that the TCTA's membership is adversely affected by the Act through its discriminatory denial of a desirable benefit. The central inquiry before us, then, is whether the injuries that the TCTA generally alleges support the kind of reasonable inference made in *Bennett* by which a constitutionally sufficient injury-in-fact may be presumed.[1]

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[1] The cases cited by the state defendants do not show that such a presumption may not be made on the facts before us. Instead they demonstrate that there must be some rational basis for that presumption. In both *Public Citizen, Inc. v. Bomer*, 274 F.3d 212 (5th Cir.2001) and *Ward v. Santa Fe Independent School District*, 393 F.3d 599 (5th Cir.2004), the plaintiffs had failed to show a connection between the alleged unconstitutional actions and an injury to the plaintiffs themselves. *See Bomer*, 274 F.3d at 218 (noting that the plaintiffs "point[ed] to no past case in which a judgment was tainted by contributions; they mention[ed] no current litigation in which an opposing party or lawyer contributed to the judge's campaign; and they merely speculate[d] as to the future"); *Ward*, 393 F.3d at 606 (noting that "[t]he only legal right or interest of the [plaintiffs] even vaguely asserted in the complaint is their right, as taxpayers, to make certain that public entities do not use tax revenue to support unconstitutional acts").

C.

The TCTA argues that its standing to challenge the Act is adequately supported by two types of injury. economic injury and constitutional injury. First, the TCTA alleges that the Act has the effect of depriving its members of revenue and profit and, second, that the Act inflicts a constitutional injury by unjustifiably treating incumbent cable providers differently from new entrants to the video services market. These injuries, in the light of *Bennett*, are more than sufficient to establish the TCTA's standing and require only brief comment.

Deprivation of revenue and profit is premised by the TCTA on lost business opportunities resulting from the Act's allowing new players into the TCTA members' respective municipal markets on more favorable terms. More specifically, the Act allows competitors to the incumbent cable providers to enter municipal markets with no requirement for municipal licensing and pass these savings on to consumers, while incumbents remain burdened with licensing costs. The TCTA therefore identifies its members' threatened loss of revenue with this increased competition that the Act allows. And the regulatory allowance of increased competition in a plaintiff's market has been established in our circuit as a clear injury-in-fact, *see Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir.1981); *Hollingsworth v. Harris*, 608 F.2d 1026, 1028 (5th Cir.1979) (per curiam), even when such competition is inchoate, as it is here.[2] As a result, the presumption of *Bennett* is

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[2] *Marsh*, where the increased competition was government sponsored, illustrates this point well. There, a railroad and other plaintiffs objected to a governmental decision that made the construction of a canal more likely. *See id.* at 1003.

well-supported: the Act was passed to increase competition and a reasonable inference may therefore be made that the TCTA's members are harmed at least to the same extent as the plaintiffs in *Marsh* and *Hollingsworth*.

D.

In addition to competitive or economic injury, a constitutional injury also provides standing. The TCTA contends that the Act unlawfully discriminates against its membership by unjustifiably favoring non-incumbents over incumbents. Discriminatory treatment at the hands of the government is an injury "long recognized as judicially cognizable." *Heckler v. Mathews*, 465 U.S. 728, 738, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984). And such injury is recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation. *See Ne. Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).[3] Here, the Act facially discriminates against

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Because the canal would compete with the railroad in the shipping market – and despite the fact that the canal's construction, much less its competition with the railroad was anything but imminent – the court found there to be sufficient injury for standing. *See id.* at 1004. *See also Hollingsworth*, 608 F.2d at 1028 (finding "[e]conomic 'injury' in the form of increased competition" adequate for standing where nursing home owner challenged administrative decision that would have allowed entry of competitor into market but where competition had not yet taken place); *New England Public Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 74 (D.C.Cir.2003); *Adams v. Watson*, 10 F.3d 915, 921 (1st Cir.1993) (collecting cases).

[3] Furthermore, the Supreme Court has recognized that such discrimination need not be predicated on suspect classifications

the TCTA's membership by extending the benefit of a state-wide license to its competitors while denying that same benefit to incumbent cable providers. As *Northeastern* held, such discrimination can constitute an injury because it positions similar parties unequally before the law; no further showing of suffering based on that unequal positioning is required for purposes of standing. Accordingly, the TCTA has alleged a constitutional injury that survives a Rule 12(b)(6) motion.[4]

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to constitute cognizable injury. In *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998), several groups challenged the constitutionality of the Line Item Veto Act. One of these groups, a farmer's cooperative, claimed that it was injured when the President canceled a tax benefit that would have aided it in obtaining certain processing facilities. *See id.* at 432. This tax benefit was one of a number of benefits instituted by Congress in the Taxpayer Relief Act of 1997, but only one of two that the President vetoed. *Id.* In defending the statute, the government argued that the cooperative had not shown that it "would have actually obtained a facility on favorable terms." *Id.* at 433 n. 22. The court rejected this argument, citing *Northeastern Florida* for the proposition that "denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result." *Id.* The farmer's cooperative, consisting of Idaho potato farmers, assuredly was not a member of a suspect classification. We do note that this holding is illustrative of the fact that the line between constitutional and economic injury can sometimes be a bit blurred.

[4] The reasons we have noted above are sufficient to conclude that the district court erred in dismissing the TCTA's complaint for lack of standing and that the case must proceed to the next step. We will, however, briefly note further arguments that defendants make regarding standing. Each lacks merit.

With respect to associational standing, only the third of the three requirements is directly challenged, that is that the individual participation of the members of the association is unnecessary. Member participation is not required here. The TCTA alleges that the Act increases competition for its mem-

E.

Ripeness is the last matter requiring our attention. "To determine if a case is ripe for adjudication, a

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bership. Such allegations are, in the light of *Bennett* and *Marsh*, more than sufficient to establish standing; the participation of the TCTA's members would merely provide more detail to the already sufficient general allegation that the TCTA's members will face increased competition due to the actions of the Texas legislature. Such economic data is not required under *Northeastern Florida* – discrimination and its coordinate loss of opportunity to compete is sufficient.

The defendants also argue that the TCTA has mounted a facial challenge; it therefore must show injury in every application of the Act. For standing purposes, the Supreme Court has said that "[w]hen asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing." *City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion). *See also Henderson v. Stalder*, 287 F.3d 374, 385 n. 4 (5th Cir.2002) (Jones, J., concurring); *Thibodeau v. Portuondo*, 486 F.3d 61, 71 (2d Cir.2007). But the TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court. The proper inquiry is therefore one of associational standing rather than third-party standing. *Cf. United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) ("Indeed, the entire doctrine of 'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties." (footnotes omitted)). In any event, both of the defendants' arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of, first, associational standing, or, second, a facial challenge, lack merit.

court must evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Texas v. United States*, 497 F.3d 491, 498 (5th Cir.2007). The doctrines of ripeness and standing "often overlap in practice, particularly in an examination of whether a plaintiff has suffered a concrete injury." *Id.* at 496. And such is the case here.

The dismissal for lack of ripeness apparently was based in substantial part on a statement made by the TCTA during oral argument before the district court, specifically, its answer that "it's too soon to tell" in response to the district court's questioning regarding the effect of the Act on the profits of the TCTA's members. The district court therefore appears to have concluded on that basis that the level of economic injury suffered by the TCTA's members was not yet discernable and therefore considered them not yet injured; thus the case was not fit for litigation. But, as set out above, allegations of tactile economic harm are not a necessary predicate of a cognizable injury, particularly given the procedural posture of this case at the time of dismissal. As such, no other events needed to have been alleged for the TCTA's stated injury to satisfy Article III requirements. In short, the defendants' ripeness argument lacks merit for essentially the same reasons that we have rejected their standing arguments.

IV.

We thus conclude that the TCTA has alleged injuries sufficient to satisfy the requirements of standing, and its claims are ripe for further proceedings. Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. A 05 CA 721 LY

TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION,
Plaintiff,

v.

PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS; JULIE PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS; BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS,
Defendants,

TEXAS COALITION OF CITIES FOR UTILITY ISSUES; GTE SOUTHWEST INC. D/B/A VERIZON SOUTHWEST; SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS; GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor-Defendants.

Sept. 28, 2006

ORDER

YEAKEL, District Judge.

Before the Court are Defendants' Motion to Dismiss filed November 10, 2005 (Doc. # 6); Motion of Intervenor-Defendant GTE Southwest Inc. d/b/a

Verizon Southwest to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted filed November 10, 2005 (Doc. # 12); SBC Texas's Motion to Dismiss filed November 10, 2005 (Doc. # 15); Grande Communications Networks, Inc.'s Motion to Dismiss filed November 14, 2005 (Doc. # 40); Motion by Texas Coalition of Cities for Utility Issues for Judgment on the Pleadings filed November 21, 2005 (Doc. # 44); Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss filed January 17, 2006 (Doc. # 53); Grande Communications Networks, Inc.'s Reply Brief in Support of its Motion to Dismiss filed February 17, 2006 (Doc. # 63); TCCFUI's Reply to Cable Association's Response Opposing Dismissal filed February 17, 2006 (Doc. # 67); Reply in Further Support of State's Motion to Dismiss filed February 17, 2006 (Doc. # 68); Reply Memorandum in Further Support of the Motion of Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted filed February 17, 2006 (Doc. # 69); and Reply of AT & T Texas in Support of its Motion to Dismiss filed February 17, 2006 (Doc. # 70).

Also before the Court are Plaintiff's Motion for Summary Judgment filed January 17, 2006 (Doc. # 52); TCCFUI's Response to Cable Association's Motion for Summary Judgment filed February 17, 2006 (Doc. # 66); Grande Communications Networks, Inc.'s Response in Opposition to TCTA's Motion for Summary Judgment filed February 24, 2006 (Doc. # 72); Defendants' Opposition to Plaintiff's Motion for Summary Judgment filed February 24, 2006 (Doc. # 74); Memorandum of Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest in

Opposition to Plaintiff's Motion for Summary Judgment filed February 24, 2006 (Doc. # 75); Opposition of AT&T Texas to Motion of TCTA for Summary Judgment filed February 24, 2006 (Doc. # 76); and Plaintiff's Reply Brief in Support of its Motion for Summary Judgment filed April 5, 2006 (Doc. # 82).

Following the filing of Plaintiff's summary-judgment motion, Grande Communications Networks, Inc. filed a Motion to Strike the Dale Lane Declaration as Summary Judgment Evidence filed February 24, 2006 (Doc. # 73). Plaintiff's Opposition to Grande's Motion to Strike was filed April 5, 2006 (Doc. # 83). Having considered the motion and response, the Court is of the opinion that the motion should be denied.

IT IS THEREFORE ORDERED that Grande Communications Networks, Inc.'s Motion to Strike the Dale Lane Declaration as Summary Judgment Evidence filed February 24, 2006 (Doc. # 73) is **DENIED.**

A hearing on the above-listed motions was held before the Court on May 22, 2006. At the conclusion of the hearing, the parties filed the following post-hearing letter briefs: TCCFUI's letter brief dated May 25, 2006, received by the Court on May 25, 2006; AT&T Texas's letter brief filed May 26, 2006 (Doc. # 86); Grande Communications Networks, Inc.'s letter brief filed May 31, 2006 (Doc. # 87); Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest's letter brief filed May 31, 2006 (Doc. # 88); State Defendants' letter brief filed June 2, 2006 (Doc. # 89); and Plaintiff's letter brief filed June 9, 2006 (Doc. # 90).

I. Background

Plaintiff Texas Cable & Telecommunications Association ("TCTA"), a trade organization representing incumbent cable operators in Texas, filed this lawsuit challenging the "Act Relating to Furthering Competition in the Communications Industry," S.B. 5, 79th Leg., 2d Sess. (Texas 2005) (the "Act"), an act of the Texas Legislature that went into effect on September 7, 2005. The Act amends Subtitle C, Title 2, of the Texas Utilities Code by adding a new Chapter 66 entitled "State-Issued Cable and Video Franchise." *See* TEX. UTIL. CODE ANN. § 66.003(b), (c) (West Supp.2006). According to TCTA, the Act allows new entrants to obtain Texas Public Utility Commission ("PUC")-issued franchises and allows overbuilders to obtain PUC-issued franchises after renouncing their municipal franchises. At the same time, TCTA argues, the Act locks incumbent cable operators into existing municipal franchises. Even after incumbent cable operators become eligible for PUC-issued franchises, TCTA contends, the Act subjects them to more onerous franchising terms.

On September 8, 2005, the day after the Governor of the State of Texas signed the Act, TCTA filed this action against the Governor and each of the PUC Commissioners, alleging the following four counts: (1) Count I charged that the Act's disparate treatment of, on the one hand, new entrants and overbuilders, and, on the other hand, incumbent cable operators, lacks any appropriate justification and therefore violates applicable protections under the First Amendment, the Due Process Clause, and the Equal Protection Clause of the United States Constitution; (2) Count II charged that the same disparate treatment conflicts with Title VI of the Federal

Communications Act and is therefore preempted in violation of the Supremacy Clause of the United States Constitution; (3) Count III charged that Section 66.004(b), which renders incumbents ineligible for a state-issued franchise, is preempted as conflicting with Section 621(a)(1) of the Federal Communications Act, 47 U.S.C. § 541(a)(1) in violation of the Supremacy Clause of the United States Constitution; and (4) Count IV charged that, insofar as the Act prohibits the PUC from imposing anti-redlining assurances, it is preempted by Section 621(a)(3) of the Federal Communications Act, 47 U.S.C. § 541(a)(3) in violation of the Supremacy Clause of the United States Constitution.

Four parties subsequently intervened as Defendants: (1) Grande Communications Networks, Inc.; (2) GTE Southwest Inc. d/b/a Verizon Southwest; (3) Southwestern Bell Telephone, L.P., d/b/a SBC Texas ("SBC Texas"); and (4) the Coalition of Cities for Utility Issues ("TCCFUI"). Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, each Defendant and Intervenor-Defendant filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The only exception was TCCFUI, which, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, filed a motion for judgment on the pleadings. In that motion, TCCFUI notes that the standard for considering its motion is identical to that of Defendants' motions to dismiss. Plaintiff TCTA also filed a motion for summary judgment. The Court will address the motions to dismiss first.

II. Analysis

In ruling on a motion to dismiss for failure to state a claim, the Court must test the formal sufficiency of

the statement of the claim for relief. *See Doe v. Hillsboro ISD*, 81 F.3d 1395, 1401-02 (5th Cir.1996). All well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiff. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir.1999); *Hillsboro ISD*, 81 F.3d at 1401-02 (citing *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir.1995)). A Rule 12(b)(6) motion to dismiss should be granted when the complaint lacks a cognizable legal theory or fails to set forth facts sufficient to support a legal theory. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 2d* § 1357 at 340 (1990 & Supp.2003 at 361). The issue is not whether a plaintiff will ultimately prevail but whether it is entitled to offer evidence to support its claims. *Hillsboro ISD*, 81 F.3d at 1401. The Court should dismiss for failure to state a claim only if the court can determine to a certainty that the plaintiff cannot prove any set of facts that would allow relief under the allegations in the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). In determining whether a claimant has pleaded sufficient facts, only specific facts, not mere conclusory allegations or unwarranted deductions, are accepted as true and are considered. *See Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir.1994).

In its motion to dismiss, SBC Texas argues that TCTA's claims cannot be considered by the Court until TCTA can present a specific controversy for judicial resolution. *See United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). A facial challenge to a legislative act is the most difficult challenge to mount successfully because the challenger must establish that no set of circum-

stances exists under which the act would be valid. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The fact that an act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. *See id.* In the instant cause, TCTA's evidence falls short of establishing that the Act will inflict inevitable or even probable harm on its member cable operators at this time.

In reviewing a preemption-based facial challenge, the Court does "not rest [its] decision on consequences that, while possible, are by no means predictable." *Department of Taxation & Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 69, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994). The very foundation of the power of the federal courts to declare statutes unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. *See United States v. Raines*, 362 U.S. 17, 20, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). Thus, this Court has no jurisdiction to pronounce any statute unconstitutional, except as it is called upon to adjudge the legal rights of litigants in actual controversies. *See id.* at 21, 80 S.Ct. 519. In the exercise of that jurisdiction, the Court is bound by two rules: (1) not to anticipate a question of constitutional law in advance of the necessity of deciding it, and (2) not to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *See id.* Most significant is the incontrovertible proposition that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *Barrows v. Jackson*, 346 U.S. 249, 256, 73 S.Ct. 1031,

97 L.Ed. 1586 (1953). Nor would the Court be ready to frustrate the expressed will of a state legislature. *See id.* at 256-57, 73 S.Ct. 1031 (citing *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 172, 59 S.Ct. 389, 83 L.Ed. 586 (1939)). The delicate power of pronouncing an act unconstitutional is not to be exercised with reference to hypothetical cases or possible scenarios. *See Raines*, 362 U.S. at 22, 80 S.Ct. 519. The application of this rule frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy. *See id.*

TCTA's concessions before the Court at the May 22, 2006 hearing that it is too soon to tell what economic impact the Act will have and to what extent there is disparate treatment of incumbent cable providers are fatal to its constitutional challenges under the First Amendment, Due Process and Equal Protection Clauses, and the Supremacy Clause of the United States Constitution in all four counts in its complaint. In other words, TCTA cannot identify any concrete cognizable harm suffered by any of its members, having stated only that it is "too early to tell" the economic impact of the Act. Until TCTA can establish the Act's harmful impact on its incumbent cable providers, TCTA's claims are not ripe for the Court's consideration. Therefore, the Court shall dismiss all TCTA's claims as premature.

III. Conclusion

The Court **ORDERS** that SBC Texas's Motion to Dismiss filed November 10, 2005 (Doc. # 15) is **GRANTED** as to all Defendants and Intervenor-Defendants. Plaintiff Texas Cable & Telecommunications Association's claims against Defendants Rick

Perry, Paul Hudson, Julie Parsley, and Barry Smitherman and Intervenor-Defendants GTE Southwest Inc. d/b/a Verizon Southwest, Southwestern Bell Telephone, L.P. d/b/a SBC Texas, Grande Communications Networks, Inc., and the Texas Coalition of Cities for Utility Issues are **DISMISSED WITHOUT PREJUDICE**.

Having granted Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest's motion to dismiss as to all Defendants and Intervenor-Defendants in this cause, the Court **FURTHER ORDERS** the following motions **DISMISSED**: Defendants' Motion to Dismiss filed November 10, 2005 (Doc. # 6); the Motion of Intervenor-Defendant GTE Southwest Inc. d/b/a Verizon Southwest to Dismiss the Complaint for Failure to State a Claim upon which Relief Can Be Granted filed November 10, 2005 (Doc. # 12); Grande Communications Networks, Inc.'s Motion to Dismiss filed November 14, 2005 (Doc. # 40); and Motion by Texas Coalition of Cities for Utility Issues for Judgment on the Pleadings filed November 21, 2005 (Doc. # 44).

In light of the Court's dismissal of all claims without prejudice, the Court **FURTHER ORDERS** that Plaintiff's Motion for Summary Judgment filed January 17, 2006 (Doc. # 52) is **DISMISSED**.

The Court **FINALLY ORDERS** that all further relief not expressly granted is **DENIED**.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-51514

TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION,
Plaintiff-Appellant,

v.

PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS; JULIE PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS; BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS,
Defendants-Appellees,

AND

TEXAS COALITION OF CITIES FOR UTILITY ISSUES; GTE SOUTHWEST INC. D/B/A VERIZON SOUTHWEST; SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS; GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor Defendants-Appellees.

Mar. 14, 2008

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING

Before JOLLY, DAVIS and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing of GTE Southwest Inc. doing business as Verizon Southwest is DENIED.

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY

United States Circuit Judge

UNITED STATES COURT OF APPEALS
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v.

PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS; JULIE PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS; BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS,
Defendants-Appellees,

AND

TEXAS COALITION OF CITIES FOR UTILITY ISSUES; GTE SOUTHWEST INC. D/B/A VERIZON SOUTHWEST; SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS; GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor Defendants-Appellees.

Mar. 14, 2008

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Opinion 2/7/08, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, DAVIS and WIENER

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc of Southwestern Bell Telephone LP, doing business as SBC Texas as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc of Southwestern Bell Telephone LP, doing business as SBC Texas as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. GRADY JOLLY

United States Circuit Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Free Speech Clause of the First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the United States Constitution provide:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 621 of the Communications Act of 193 47 U.S.C. § 541, provides:

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure –

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority –

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services –

(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and

(ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof –

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this subchapter with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d) Informational tariffs; regulation by States; "State" defined

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 153 of this title.

(e) State regulation of facilities serving subscribers in multiple dwelling units

Nothing in this subchapter shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control,

or management and which does not use any public right-of-way.

(f) Local or municipal authority as multichannel video programming distributor

No provision of this chapter shall be construed to –

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

TEXAS UTILITIES CODE

CHAPTER 66. STATE-ISSUED CABLE AND VIDEO FRANCHISE

Sec. 66.001. FRANCHISING AUTHORITY. The commission shall be designated as the franchising authority for a state-issued franchise for the provision of cable service or video service.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.002. DEFINITIONS. In this chapter:

(1) "Actual incremental cost" means only current out-of-pocket expenses for labor, equipment repair, equipment replacement, and tax expenses directly associated with the labor or the equipment of a service provider that is necessarily and directly used to provide what were, under a superseded franchise, in-kind services, exclusive of any profit or overhead such as depreciation, amortization, or administrative expense.

(2) "Cable service" is defined as set forth in 47 U.S.C. Section 522(6).

(3) "Cable service provider" means a person who provides cable service.

(4) "Communications network" means a component or facility that is, wholly or partly, physically located within a public right-of-way and that is used to provide video programming, cable, voice, or data services.

(5) "Franchise" means an initial authorization, or renewal of an authorization, issued by a franchising authority, regardless of whether the authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, that

authorizes the construction and operation of a cable or video services network in the public rights-of-way.

(6)(A) "Gross revenues" means all consideration of any kind or nature including without limitation cash, credits, property, and in-kind contributions (services or goods) derived by the holder of a state-issued certificate of franchise authority from the operation of the cable service provider's or the video service provider's network to provide cable service or video service within the municipality. Gross revenue shall include all consideration paid to the holder of a state-issued certificate of franchise authority and its affiliates (to the extent either is acting as a provider of a cable service or video service as authorized by this chapter), which shall include but not be limited to the following: (i) all fees charged to subscribers for any and all cable service or video service provided by the holder of a state-issued certificate of franchise authority; (ii) any fee imposed on the holder of a state-issued certificate of franchise authority by this chapter that is passed through and paid by subscribers (including without limitation the franchise fee set forth in this chapter); and (iii) compensation received by the holder of a state-issued certificate of franchise authority or its affiliates that is derived from the operation of the holder of a state-issued certificate of franchise authority's network to provide cable service or video service with respect to commissions that are paid to the holder of a state-issued certificate of franchise authority as compensation for promotion or exhibition of any products or services on the holder of a state-issued certificate of franchise authority's network, such as a "home shopping" or a similar channel, subject to Paragraph (B)(v). Gross revenue includes a pro rata portion of all revenue derived by the

holder of a state-issued certificate of franchise authority or its affiliates pursuant to compensation arrangements for advertising derived from the operation of the holder of a state-issued certificate of franchise authority's network to provide cable service or the video service within a municipality, subject to Paragraph (B)(iii). The allocation shall be based on the number of subscribers in the municipality divided by the total number of subscribers in relation to the relevant regional or national compensation arrangement. Advertising commissions paid to third parties shall not be netted against advertising revenue included in gross revenue. Revenue of an affiliate derived from the affiliate's provision of cable service or the video service shall be gross revenue to the extent the treatment of such revenue as revenue of the affiliate and not of the holder of a state-issued certificate of franchise authority has the effect (whether intentional or unintentional) of evading the payment of fees which would otherwise be paid to the municipality. In no event shall revenue of an affiliate be gross revenue to the holder of a state-issued certificate of franchise authority if such revenue is otherwise subject to fees to be paid to the municipality.

(B) For purposes of this section, "gross revenues" does not include:

(i) any revenue not actually received, even if billed, such as bad debt;

(ii) non-cable services or non-video services revenues received by any affiliate or any other person in exchange for supplying goods or services used by the holder of a state-issued certificate of franchise authority to provide cable service or video service;

(iii) refunds, rebates, or discounts made to subscribers, leased access providers, advertisers, or a municipality;

(iv) any revenues from services classified as non-cable service or non-video service under federal law including without limitation revenue received from telecommunications services; revenue received from information services (but not excluding cable services or video services); and any other revenues attributed by the holder of a state-issued certificate of franchise authority to non-cable service or non-video service in accordance with Federal Communications Commission or commission rules, regulations, standards, or orders;

(v) any revenue paid by subscribers to home shopping programmers directly from the sale of merchandise through any home shopping channel offered as part of the cable services or video services, but not excluding any commissions that are paid to the holder of a state-issued certificate of franchise authority as compensation for promotion or exhibition of any products or services on the holder of a state-issued certificate of franchise authority's network, such as a "home shopping" or a similar channel;

(vi) the sale of cable services or video services for resale in which the purchaser is required to collect this chapter's fees from the purchaser's customer. Nothing under this chapter is intended to limit state's rights pursuant to 47 U.S.C. Section 542(h);

(vii) the provision of cable services or video services to customers at no charge, as required or allowed by this chapter, including without limitation the provision of cable services or video services to public institutions, as required or permitted in

this chapter, including without limitation public schools or governmental entities, as required or permitted in this chapter;

(viii) any tax of general applicability imposed upon the holder of a state-issued certificate of franchise authority or upon subscribers by a city, state, federal, or any other governmental entity and required to be collected by the holder of a state-issued certificate of franchise authority and remitted to the taxing entity (including, but not limited to, sales and use tax, gross receipts tax, excise tax, utility users tax, public service tax, communication taxes, and fees not imposed by this chapter);

(ix) any forgone revenue from the holder of a state-issued certificate of franchise authority's provision of free or reduced cost cable services or video services to any person including without limitation employees of the holder of a state-issued certificate of franchise authority, to the municipality and other public institutions or other institutions as allowed in this chapter; provided, however, that any forgone revenue which the holder of a state-issued certificate of franchise authority chooses not to receive in exchange for trades, barters, services, or other items of value shall be included in gross revenue;

(x) sales of capital assets or sales of surplus equipment that is not used by the purchaser to receive cable services or video services from the holder of a state-issued certificate of franchise authority;

(xi) directory or Internet advertising revenue including, but not limited to, yellow pages, white pages, banner advertisement, and electronic publishing; and

(xii) reimbursement by programmers of marketing costs incurred by the holder of a state-issued franchise for the introduction of new programming that exceed the actual costs.

(C) For purposes of this definition, a provider's network consists solely of the optical spectrum wavelengths, bandwidth, or other current or future technological capacity used for the transmission of video programming over wireline directly to subscribers within the geographic area within the municipality as designated by the provider in its franchise.

(7) "Incumbent cable service provider" means the cable service provider serving the largest number of cable subscribers in a particular municipal franchise area on September 1, 2005.

(8) "Public right-of-way" means the area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which a municipality has an interest.

(9) "Video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station, as set forth in 47 U.S.C. Section 522(20).

(10) "Video service" means video programming services provided through wireline facilities located at least in part in the public right-of-way without regard to delivery technology, including Internet protocol technology. This definition does not include any video service provided by a commercial mobile service provider as defined in 47 U.S.C. Section 332(d).

(11) "Video service provider" means a video programming distributor that distributes video programming services through wireline facilities located at least in part in the public right-of-way without

regard to delivery technology. This term does not include a cable service provider.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.003. STATE AUTHORIZATION TO PROVIDE CABLE SERVICE OR VIDEO SERVICE. (a) An entity or person seeking to provide cable service or video service in this state after September 1, 2005, shall file an application for a state-issued certificate of franchise authority with the commission as required by this section. An entity providing cable service or video service under a franchise agreement with a municipality is not subject to this subsection with respect to such municipality until the franchise agreement expires, except as provided by Section 66.004.

(a-1) The commission shall notify an applicant for a state-issued certificate of franchise authority whether the applicant's affidavit described by Subsection (b) is complete before the 15th business day after the applicant submits the affidavit.

(b) The commission shall issue a certificate of franchise authority to offer cable service or video service before the 17th business day after receipt of a completed affidavit submitted by the applicant and signed by an officer or general partner of the applicant affirming:

(1) that the applicant has filed or will timely file with the Federal Communications Commission all forms required by that agency in advance of offering cable service or video service in this state;

(2) that the applicant agrees to comply with all applicable federal and state statutes and regulations;

(3) that the applicant agrees to comply with all applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery of the cable service or video service, including the police powers of the municipalities in which the service is delivered;

(4) a description of the service area footprint to be served within the municipality, if applicable, otherwise the municipality to be served by the applicant, which may include certain designations of unincorporated areas, which description shall be updated by the applicant prior to the expansion of cable service or video service to a previously undesignated service area and, upon such expansion, notice to the commission of the service area to be served by the applicant; and

(5) the location of the applicant's principal place of business and the names of the applicant's principal executive officers.

(c) The certificate of franchise authority issued by the commission shall contain:

(1) a grant of authority to provide cable service or video service as requested in the application;

(2) a grant of authority to use and occupy the public rights-of-way in the delivery of that service, subject to the laws of this state, including the police powers of the municipalities in which the service is delivered; and

(3) a statement that the grant of authority is subject to lawful operation of the cable service or video service by the applicant or its successor in interest.

(d) The certificate of franchise authority issued by the commission is fully transferable to any successor in interest to the applicant to which it is initially

granted. A notice of transfer shall be filed with the commission and the relevant municipality within 14 business days of the completion of such transfer.

(e) The certificate of franchise authority issued by the commission may be terminated by the cable service provider or video service provider by submitting notice to the commission.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.004. ELIGIBILITY FOR COMMISSION-ISSUED FRANCHISE. (a) A cable service provider or a video service provider that currently has or had previously received a franchise to provide cable service or video service with respect to such municipalities is not eligible to seek a state-issued certificate of franchise authority under this chapter as to those municipalities until the expiration date of the existing franchise agreement, except as provided by Subsections (b) and (c).

(b) Beginning September 1, 2005, a cable service provider or video service provider that is not the incumbent cable service provider and serves fewer than 40 percent of the total cable customers in a particular municipal franchise area may elect to terminate that municipal franchise and seek a state-issued certificate of franchise authority by providing written notice to the commission and the affected municipality before January 1, 2006. The municipal franchise is terminated on the date the commission issues the state-issued certificate of franchise authority.

(c) A cable service provider that serves fewer than 40 percent of the total cable customers in a municipal franchise area and that elects under Subsection (b) to terminate an existing municipal franchise is respon-

sible for remitting to the affected municipality before the 91st day after the date the municipal franchise is terminated any accrued but unpaid franchise fees due under the terminated franchise. If the cable service provider has credit remaining from prepaid franchise fees, the provider may deduct the amount of the remaining credit from any future fees or taxes it must pay to the municipality, either directly or through the comptroller.

(d) For purposes of this section, a cable service provider or video service provider will be deemed to have or have had a franchise to provide cable service or video service in a specific municipality if any affiliates or successor entity of the cable or video provider has or had a franchise agreement granted by that specific municipality.

(e) The terms "affiliates or successor entity" in this section shall include but not be limited to any entity receiving, obtaining, or operating under a municipal cable or video franchise through merger, sale, assignment, restructuring, or any other type of transaction.

(f) Except as provided in this chapter, nothing in this chapter is intended to abrogate, nullify, or adversely affect in any way the contractual rights, duties, and obligations existing and incurred by a cable service provider or a video service provider before the enactment of this chapter, and owed or owing to any private person, firm, partnership, corporation, or other entity including without limitation those obligations measured by and related to the gross revenue hereafter received by the holder of a state-issued certificate of franchise authority for services provided in the geographic area to which such prior franchise or permit applies. All liens, security

interests, royalties, and other contracts, rights, and interests in effect on September 1, 2005, shall continue in full force and effect, without the necessity for renewal, extension, or continuance, and shall be paid and performed by the holder of a state-issued certificate of franchise authority, and shall apply as though the revenue generated by the holder of a state-issued certificate of franchise authority continued to be generated pursuant to the permit or franchise issued by the prior local franchising authority or municipality within the geographic area to which the prior permit or franchise applies. It shall be a condition to the issuance and continuance of a state-issued certificate of franchise authority that the private contractual rights and obligations herein described continue to be honored, paid, or performed to the same extent as though the cable service provider continued to operate under its prior franchise or permit, for the duration of such state-issued certificate of franchise authority and any renewals or extensions thereof, and that the applicant so agrees. Any person, firm, partnership, corporation, or other entity holding or claiming rights herein reserved may enforce same by an action brought in a court of competent jurisdiction.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.005. FRANCHISE FEE. (a) The holder of a state-issued certificate of franchise authority shall pay each municipality in which it provides cable service or video service a franchise fee of five percent based upon the definition of gross revenues as set forth in this chapter. That same franchise fee structure shall apply to any unincorporated areas that are

annexed by a municipality after the effective date of the state-issued certificate of franchise authority.

(b) The franchise fee payable under this section is to be paid quarterly, within 45 days after the end of the quarter for the preceding calendar quarter. Each payment shall be accompanied by a summary explaining the basis for the calculation of the fee. A municipality may review the business records of the cable service provider or video service provider to the extent necessary to ensure compensation in accordance with Subsection (a). Each party shall bear the party's own costs of the examination. A municipality may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction.

(c) The holder of a state-issued certificate of franchise authority may recover from the provider's customers any fee imposed by this chapter.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.006. IN-KIND CONTRIBUTIONS TO MUNICIPALITY. (a) Until the expiration of the incumbent cable service provider's agreement, the holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service the same cash payments on a per subscriber basis as required by the incumbent cable service provider's franchise agreement. All cable service providers and all video service providers shall report quarterly to the municipality the total number of subscribers served within the municipality. The amount paid by the holder of a state-issued certificate of franchise authority shall be calculated quarterly by the municipality by multiply-

ing the amount of cash payment under the incumbent cable service provider's franchise agreement by a number derived by dividing the number of subscribers served by a video service provider or cable service provider by the total number of video or cable service subscribers in the municipality. Such pro rata payments are to be paid quarterly to the municipality within 45 days after the end of the quarter for the preceding calendar quarter.

(b) On the expiration of the incumbent cable service provider's agreement, the holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service one percent of the provider's gross revenues, as defined by this chapter, or at the municipality's election, the per subscriber fee that was paid to the municipality under the expired incumbent cable service provider's agreement, in lieu of in-kind compensation and grants. Payments under this subsection shall be paid in the same manner as outlined in Section 66.005(b).

(c) All fees paid to municipalities under this section are paid in accordance with 47 U.S.C. Sections 531 and 541(a)(4)(B) and may be used by the municipality as allowed by federal law; further, these payments are not chargeable as a credit against the franchise fee payments authorized under this chapter.

(d) The following services shall continue to be provided by the cable provider that was furnishing services pursuant to its municipal cable franchise until January 1, 2008, or until the term of the franchise was to expire, whichever is later, and thereafter as provided in Subdivisions (1) and (2) below:

(1) institutional network capacity, however defined or referred to in the municipal cable franchise but generally referring to a private line data network capacity for use by the municipality for noncommercial purposes, shall continue to be provided at the same capacity as was provided to the municipality prior to the date of the termination, provided that the municipality will compensate the provider for the actual incremental cost of the capacity; and

(2) cable services to community public buildings, such as municipal buildings and public schools, shall continue to be provided to the same extent provided immediately prior to the date of the termination. Beginning on January 1, 2008, or the expiration of the franchise agreement, whichever is later, a provider that provides the services may deduct from the franchise fee to be paid to the municipality an amount equal to the actual incremental cost of the services if the municipality requires the services after that date. Such cable service generally refers to the existing cable drop connections to such facilities and the tier of cable service provided pursuant to the franchise at the time of the termination.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.007. BUILD-OUT. The holder of a state-issued certificate of franchise authority shall not be required to comply with mandatory build-out provisions.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.008. CUSTOMER SERVICE STANDARDS. The holder of a state-issued certificate of franchise authority shall comply with customer service requirements consistent with 47 C.F.R. Section 76.309(c) until there are two or more providers offering service, excluding direct-to-home satellite service, in the relevant municipality.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.009. PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS CHANNELS. (a) Not later than 120 days after a request by a municipality, the holder of a state-issued certificate of franchise authority shall provide the municipality with capacity in its communications network to allow public, educational, and governmental (PEG) access channels for noncommercial programming.

(b) The holder of a state-issued certificate of franchise authority shall provide no fewer than the number of PEG access channels a municipality has activated under the incumbent cable service provider's franchise agreement as of September 1, 2005.

(c) If a municipality did not have PEG access channels as of September 1, 2005, the cable service provider or video service provider shall furnish:

(1) up to three PEG channels for a municipality with a population of at least 50,000; and

(2) up to two PEG channels for a municipality with a population of less than 50,000.

(d) Any PEG channel provided pursuant to this section that is not utilized by the municipality for at least eight hours a day shall no longer be made available to the municipality, but may be

programmed at the cable service provider's or video service provider's discretion. At such time as the municipality can certify to the cable service provider or video service provider a schedule for at least eight hours of daily programming, the cable service provider or video service provider shall restore the previously lost channel but shall be under no obligation to carry that channel on a basic or analog tier.

(e) In the event a municipality has not utilized the minimum number of access channels as permitted by Subsection (c), access to the additional channel capacity allowed in Subsection (c) shall be provided upon 90 days' written notice if the municipality meets the following standard: if a municipality has one active PEG channel and wishes to activate an additional PEG channel, the initial channel shall be considered to be substantially utilized when 12 hours are programmed on that channel each calendar day. In addition, at least 40 percent of the 12 hours of programming for each business day on average over each calendar quarter must be nonrepeat programming. Nonrepeat programming shall include the first three video-castings of a program. If a municipality is entitled to three PEG channels under Subsection (c) and has in service two active PEG channels, each of the two active channels shall be considered to be substantially utilized when 12 hours are programmed on each channel each calendar day and at least 50 percent of the 12 hours of programming for each business day on average over each calendar quarter is nonrepeat programming for three consecutive calendar quarters.

(f) The operation of any PEG access channel provided pursuant to this section shall be the responsibility of the municipality receiving the benefit of such

channel, and the holder of a state-issued certificate of franchise authority bears only the responsibility for the transmission of such channel. The holder of a state-issued certificate of franchise authority shall be responsible for providing the connectivity to each PEG access channel distribution point up to the first 200 feet.

(g) The municipality must ensure that all transmissions, content, or programming to be transmitted over a channel or facility by a holder of a state-issued certificate of franchise authority are provided or submitted to the cable service provider or video service provider in a manner or form that is capable of being accepted and transmitted by a provider, without requirement for additional alteration or change in the content by the provider, over the particular network of the cable service provider or video service provider, which is compatible with the technology or protocol utilized by the cable service provider or video service provider to deliver services.

(h) Where technically feasible, the holder of a state-issued certificate of franchise authority and an incumbent cable service provider shall use reasonable efforts to interconnect their cable or video systems for the purpose of providing PEG programming. Interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection. Holders of a state-issued certificate of franchise authority and incumbent cable service providers shall negotiate in good faith and incumbent cable service providers may not withhold interconnection of PEG channels.

(i) A court of competent jurisdiction shall have exclusive jurisdiction to enforce any requirement under this section.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.010. NONDISCRIMINATION BY MUNICIPALITY. (a) A municipality shall allow the holder of a state-issued certificate of franchise authority to install, construct, and maintain a communications network within a public right-of-way and shall provide the holder of a state-issued certificate of franchise authority with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way. All use of a public right-of-way by the holder of a state-issued certificate of franchise authority is nonexclusive and subject to Section 66.011.

(b) A municipality may not discriminate against the holder of a state-issued certificate of franchise authority regarding:

(1) the authorization or placement of a communications network in a public right-of-way;

(2) access to a building; or

(3) a municipal utility pole attachment term.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.011. MUNICIPAL POLICE POWER; OTHER AUTHORITY. (a) A municipality may enforce police power-based regulations in the management of a public right-of-way that apply to the holder of a state-issued certificate of franchise authority within the municipality. A municipality may enforce police power-based regulations in the management of

the activities of the holder of a state-issued certificate of franchise authority to the extent that they are reasonably necessary to protect the health, safety, and welfare of the public. Police power-based regulation of the holder of a state-issued certificate of franchise authority's use of the public right-of-way must be competitively neutral and may not be unreasonable or discriminatory. A municipality may not impose on activities of the holder of a state-issued certificate of franchise authority a requirement:

(1) that particular business offices be located in the municipality;

(2) regarding the filing of reports and documents with the municipality that are not required by state or federal law and that are not related to the use of the public right-of-way except that a municipality may request maps and records maintained in the ordinary course of business for purposes of locating the portions of a communications network that occupy public rights-of-way. Any maps or records of the location of a communications network received by a municipality shall be confidential and exempt from disclosure under Chapter 552, Government Code, and may be used by a municipality only for the purpose of planning and managing construction activity in the public right-of-way. A municipality may not request information concerning the capacity or technical configuration of the holder of a state-issued certificate of franchise authority's facilities;

(3) for the inspection of the holder of a state-issued certificate of franchise authority's business records except to extent permitted under Section 66.005(b);

(4) for the approval of transfers of ownership or control of the holder of a state-issued certificate of franchise authority's business, except that a municipality may require that the holder of a state-issued certificate of franchise authority maintain a current point of contact and provide notice of a transfer within a reasonable time; or

(5) that the holder of a state-issued certificate of franchise authority that is self-insured under the provisions of state law obtain insurance or bonding for any activities within the municipality, except that a self-insured provider shall provide substantially the same defense and claims processing as an insured provider. A bond may not be required from a provider for any work consisting of aerial construction except that a reasonable bond may be required of a provider that cannot demonstrate a record of at least four years' performance of work in any municipal public right-of-way free of currently unsatisfied claims by a municipality for damage to the right-of-way.

(b) Notwithstanding any other law, a municipality may require the issuance of a construction permit, without cost, to the holder of a state-issued certificate of franchise authority that is locating facilities in or on a public right-of-way in the municipality. The terms of the permit shall be consistent with construction permits issued to other persons excavating in a public right-of-way.

(c) In the exercise of its lawful regulatory authority, a municipality shall promptly process all valid and administratively complete applications of the holder of a state-issued certificate of franchise authority for a permit, license, or consent to excavate, set poles, locate lines, construct facilities, make

repairs, affect traffic flow, or obtain zoning or subdivision regulation approvals or other similar approvals. A municipality shall make every reasonable effort not to delay or unduly burden the provider in the timely conduct of the provider's business.

(d) If there is an emergency necessitating response work or repair, the holder of a state-issued certificate of franchise authority may begin the repair or emergency response work or take any action required under the circumstances without prior approval from the affected municipality, if the holder of a state-issued certificate of franchise authority notifies the municipality as promptly as possible after beginning the work and later obtains any approval required by a municipal ordinance applicable to emergency response work.

(e) The commission shall have no jurisdiction to review such police power-based regulations and ordinances adopted by a municipality to manage the public rights-of-way.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.012. INDEMNITY IN CONNECTION WITH RIGHT-OF-WAY; NOTICE OF LIABILITY. (a) The holder of a state-issued certificate of franchise authority shall indemnify and hold a municipality and its officers and employees harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees (including reasonable attorney's fees and costs of defense), proceedings, actions, demands, causes of action, liability, and suits of any kind and nature, including personal or bodily injury (including death), property damage, or other harm for which recovery of damages is sought, that

is found by a court of competent jurisdiction to be caused solely by the negligent act, error, or omission of the holder of a state-issued certificate of franchise authority or any agent, officer, director, representative, employee, affiliate, or subcontractor of the holder of a state-issued certificate of franchise authority or their respective officers, agents, employees, directors, or representatives, while installing, repairing, or maintaining facilities in a public right-of-way. The indemnity provided by this subsection does not apply to any liability resulting from the negligence of the municipality or its officers, employees, contractors, or subcontractors. If the holder of a state-issued certificate of franchise authority and the municipality are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without, however, waiving any governmental immunity available to the municipality under state law and without waiving any defenses of the parties under state law. This subsection is solely for the benefit of the municipality and the holder of a state-issued certificate of franchise authority and does not create or grant any rights, contractual or otherwise, for or to any other person or entity.

(b) The holder of a state-issued certificate of franchise authority and a municipality shall promptly advise the other in writing of any known claim or demand against the holder of a state-issued certificate of franchise authority or the municipality related to or arising out of the holder of a state-issued certificate of franchise authority's activities in a public right-of-way.

(c) The commission shall have no jurisdiction to review such police power-based regulations and ordi-

nances adopted by a municipality to manage the public rights-of-way.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.013. MUNICIPAL AUTHORITY. In addition to a municipality's authority to exercise its nondiscriminatory police power with respect to public rights-of-way under current law, a municipality's authority to regulate the holder of state-issued certificate of franchise authority is limited to:

(1) a requirement that the holder of a state-issued certificate of franchise authority who is providing cable service or video service within the municipality register with the municipality and maintain a point of contact;

(2) the establishment of reasonable guidelines regarding the use of public, educational, and governmental access channels; and

(3) submitting reports within 30 days on the customer service standards referenced in Section 66.008 if the provider is subject to those standards and has continued and unresolved customer service complaints indicating a clear failure on the part of the holder of a state-issued certificate of franchise authority to comply with the standards.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.014. DISCRIMINATION PROHIBITED. (a) The purpose of this section is to prevent discrimination among potential residential subscribers.

(b) A cable service provider or video service provider that has been granted a state-issued certificate of franchise authority may not deny access to service

to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides.

(c) An affected person may seek enforcement of the requirements described by Subsection (b) by initiating a proceeding with the commission. A municipality within which the potential residential cable service or video service subscribers referenced in Subsection (b) may be considered an affected person for purposes of this section.

(d) The holder of a state-issued certificate of franchise authority shall have a reasonable period of time to become capable of providing cable service or video service to all households within the designated franchise area as defined in Section 66.003(b)(4) and may satisfy the requirements of this section through the use of an alternative technology that provides comparable content, service, and functionality.

(e) Notwithstanding any provision of this chapter, the commission has the authority to make the determination regarding the comparability of the technology and the service provided. Notwithstanding any provision of this chapter, the commission has the authority to monitor the deployment of cable services, video services, or alternate technology.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.015. COMPLIANCE. (a) Should the holder of a state-issued certificate of franchise authority be found by a court of competent jurisdiction to be in noncompliance with the requirements of this chapter, the court shall order the holder a state-issued certificate of franchise authority, within a specified reasonable period of time, to cure such noncompliance.

Failure to comply shall subject the holder of the state-issued franchise of franchise authority to penalties as the court shall reasonably impose, up to and including revocation of the state-issued certificate of franchise authority granted under this chapter.

(b) A municipality within which the provider offers cable service or video service shall be an appropriate party in any such litigation.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

Sec. 66.016. APPLICABILITY OF OTHER LAWS. (a) Nothing in this chapter shall be interpreted to prevent a voice provider, cable service provider or video service provider, or municipality from seeking clarification of its rights and obligations under federal law or to exercise any right or authority under federal or state law.

(b) Nothing in this chapter shall limit the ability of a municipality under existing law to receive compensation for use of the public rights-of-way from entities determined not to be subject to all or part of this chapter, including but not limited to provider of Internet protocol cable or video services, unless such payments are expressly prohibited by federal law.

Added by Acts 2005, 79th Leg., 2nd C.S., Ch. 2, Sec. 27, eff. September 7, 2005.

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(4)

No. 07-1550

Supreme Court, U.S.
FILED
AUG 13 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T TEXAS,

Petitioner,

v.

TEXAS CABLE ASSOCIATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit correctly determined that an association of incumbent cable operators has standing to bring an "as applied" discrimination claim to a Texas statute that by its terms renders incumbent cable operators ineligible for licenses that are available to other cable operators.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the undersigned respondents state as follows:

No publicly held company owns an interest of 10% or more in TCA.

Time Warner Cable Inc. is a publicly traded company. Time Warner Inc. owns an interest of 10% or more in Time Warner Cable Inc.

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Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* (8th ed. 2002) 15

INTRODUCTION

AT&T asks this Court to review a decision of the Fifth Circuit that, according to AT&T, conflicts with the decisions of two other circuits. The Fifth Circuit's opinion, however, is unpublished. The part that AT&T targets is a footnote that by its terms does not express disagreement with any other court. The meaning of the footnote is in dispute among AT&T's co-defendants. And, under any reading, the footnote does not create a circuit conflict. AT&T's request for plenary review therefore must be rejected. There is likewise no warrant for the "GVR" that AT&T seeks. The intervening decision of this Court to which AT&T points announced no new principles that might cause the Fifth Circuit to change its footnote (much less its result). Thus, a GVR would be pointless.

STATEMENT OF THE CASE

1. Prior to the enactment of the state statute challenged in this litigation, cable operators in Texas were required to obtain permits to provide cable service (so-called "franchises") from the municipalities in whose territory they have cable systems. Municipalities conditioned franchises (which commonly ran for about 15 years) on cable operators' compliance with numerous and extensive regulations. For example, cities required cable operators to wire all neighborhoods in the municipality, to observe customer service requirements, to carry public access channels, and to pay various fees.

In time, the Texas Legislature came to view municipal franchising as a barrier to entry by companies that might compete with existing cable operators. As a result, it enacted the statute under chal-

lenge here, which is known as "S.B. 5."[1] Under that statute, companies wishing to provide cable service may seek a franchise from the Texas Public Utilities Commission. Holders of state-issued franchises are subject to only light regulation.

The statute specifically provides, however, that an incumbent cable system that already has a municipal franchise is ineligible for a state-issued franchise until its municipal franchise expires.[2] One might think that the Texas Legislature treated cable operators with existing municipal franchises disparately lest it upset the reliance municipalities might have placed in existing franchises. But that is incorrect: S.B. 5 specifically permits any cable system that is "not the incumbent cable service provider and serves fewer than 40 percent of the total cable customers in a particular municipal franchise area" to renounce its municipal franchise and obtain a state-issued one.[3]

Believing S.B. 5 to work unlawful discrimination, the Texas Cable and Telecommunications Association ("TCTA," which has since been renamed Texas Cable Association, or "TCA") brought this action in federal district court. TCA's complaint asserted (among other things) that its members are incumbent cable operators, that any discrimination among cable operators raises issues under the First Amendment and the Equal Protection Clause, and

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[1] S.B. 5, 79th Leg., 2d Sess. (Texas 2005).

[2] *See* Tex. Util. Code Ann. § 66.004(a).

[3] *Id.* § 66.004(b). "Incumbent cable service provider" is defined as "the cable service provider serving the largest number of cable subscribers in a particular municipal franchise area on September 1, 2005." *Id.* § 66.002(7).

that S.B. 5 fails applicable scrutiny. The district court, however, dismissed TCA's complaint on the theory that TCA had failed to plead that its members had sustained injury-in-fact. Pet. App. 25a.

TCA appealed to the Fifth Circuit, arguing that, when a plaintiff challenges a statute that by its terms grants a special benefit to some parties but withholds it from the plaintiff, the denial of the right itself constitutes injury-in-fact. In a unanimous, unpublished, opinion, the Fifth Circuit agreed: "Discriminatory treatment at the hands of the government is an injury long recognized as judicially cognizable. And such injury is recognizable for standing irrespective of whether the plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation." Pet. App. 14a (internal quotation marks, brackets, and citation omitted). This part of the court of appeals' opinion is not at issue here.

2. In a footnote that is the target of the petition, the court of appeals addressed a separate argument for affirmance on an alternative ground that had been advanced by one of S.B. 5's beneficiaries, AT&T, which had intervened as a defendant alongside the State.

In the district court, AT&T had filed a motion to dismiss arguing that TCA's challenge constituted a "facial challenge" that failed entirely if the statute could be validly applied in even a single setting. AT&T argued that the statute could be validly applied to an incumbent cable operator whose municipal franchise is less onerous than a state-issued franchise and to an incumbent cable operator who faces no local cable competition.

After the district court dismissed the complaint on grounds of standing, AT&T revived its "facial challenge" argument in the court of appeals as an alternative ground for affirmance. But, perhaps because appellate courts are not required to address alternative grounds, and perhaps concerned that the court of appeals would have no interest in reaching the merits when the district court had not, AT&T portrayed its argument as raising only threshold issues. Thus, AT&T argued that, to prevail, a facial-challenge plaintiff not only must convince the court that the challenged measure cannot validly be applied in any setting, but also must *plead* as much in his complaint.[4] In addition, AT&T argued, the plaintiff must have standing to challenge the measure in every setting.[5]

The court of appeals reached only the standing argument, rejecting it in footnote 4 of its opinion:

> We will . . . briefly note further arguments that defendants make regarding standing. Each lacks merit.
>
> . . .
>
> The defendants . . . argue that the TCTA has mounted a facial challenge; it therefore must show injury in every application of the Act. For standing purposes, the Supreme Court has said that "[w]hen asserting a facial challenge, a party

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[4] *See, e.g.*, AT&T's Fifth Circuit Br. at 31 ("TCTA did not plead that SB 5 disadvantages incumbent cable operators in all applications").

[5] *See, e.g., id.* at 1 (arguing that district court properly dismissed complaint because TCA "did not allege or attempt to show that all applications of the statute injure its members").

> seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion). *See also Henderson v. Stalder*, 287 F.3d 374, 385 n.4 (5th Cir. 2002) (Jones, J., concurring); *Thibodeau v. Portuondo*, 486 F.3d 61, 71 (2d Cir. 2007). But the TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court. The proper inquiry is therefore one of associational standing rather than third-party standing. *Cf. United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996) ("Indeed, the entire doctrine of 'representational standing,' of which the notion of 'associational standing' is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress's intent) that litigants may not assert the rights of absent third parties." (footnotes omitted)). In any event, both of the defendants' arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of, first, associational standing, or, second, a facial challenge, lack merit.

Pet. App. 15a-16a n.4.

In the wake of the court of appeals' decision, AT&T asked the Fifth Circuit to rehear the case en banc. None of the Fifth Circuit's judges requested a

vote. Pet. App. 30a. Proceedings in the district court have recommenced.

REASONS TO DENY THE WRIT

I. THIS CASE PRESENTS NO ISSUE MERITING PLENARY REVIEW.

A. If There Were a Conflict of Authority, It Would Not Be Worthy of This Court's Attention.

The heart of AT&T's argument is that a footnote in the Fifth Circuit's opinion diverges from one opinion of the Second Circuit and one opinion of the Eleventh Circuit. But the Fifth Circuit's opinion is unpublished. The opinion therefore does not constitute precedent binding on the Fifth Circuit.[6] A purported circuit split of which one side consists solely of a single unpublished opinion does not merit this Court's review: any such conflict can be resolved without this Court's intervention by the court of appeals that issued the opinion.[7] Although AT&T points (at 27 n.10) to a case in which the Court tackled a circuit split by agreeing to review an unpublished decision, the split involved in that case was

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[6] See 5th Cir. R. 47.5.4 ("Unpublished opinions . . . are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like).").

[7] *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 170 (1996) ("while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review").

already well established prior to the unpublished decision.[8] That is not the case here.

Review of an unpublished opinion is particularly inappropriate where, as here, the supposed circuit split does not appear from the face of the unpublished opinion. According to AT&T, footnote 4 of the Fifth Circuit's opinion conflicts with decisions of the Second and Eleventh Circuits. But footnote 4 does not express disagreement with decisions from those courts — to the contrary, footnote 4 cites a Second Circuit precedent with approval.[9] Thus, if there were any conflict, it would be merely implicit, and therefore particularly unlikely to generate persistent disagreement among the circuits.

B. There Is No Conflict of Authority.

Besides, there is no conflict of authority — AT&T misapprehends both the opinion of the Fifth Circuit and the opinions of the Second and Eleventh Circuits.

1. AT&T Misreads the Fifth Circuit's Opinion.

As explained above, AT&T made two arguments in the Fifth Circuit. *First*, AT&T argued that a facial-challenge plaintiff not only must convince the

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[8] *See* Petition for Writ of Certiorari at 12, *Things Remembered, Inc. v. Petrarca*, No. 94-1530 (U.S. filed Mar. 10, 1995) (explaining that the unpublished Sixth Circuit decision of which the petitioner sought review followed a position previously adopted by a published Sixth Circuit decision — and also embraced by the Fifth and Seventh Circuits — that conflicted with decisions of the Third and Eleventh Circuits).

[9] *See* Pet. App. 16a n.4 (citing *Thibodeau v. Portuondo*, 486 F.3d 61, 71 (2d Cir. 2007)).

district court that the challenged measure cannot lawfully be applied in any setting, but also must plead as much. *Second*, AT&T argued that a facial-challenge plaintiff must convince the district court (and plead) not only that the challenged measure has no lawful application, but also that the plaintiff would have standing to challenge every application.[10]

AT&T reads footnote 4 as rejecting the first argument: according to AT&T, the court of appeals held that TCTA may "maintain a facial attack on SB 5 notwithstanding that TCTA did not, because it could not, allege that all applications of SB 5 to its members are unlawful." Pet. 12. In fact, however, the court of appeals addressed only the second argument, relating to standing.[11]

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[10] AT&T repeats the two arguments in the petition. *See* Pet. 18 ("TCTA *must allege* that SB 5 is unlawful in all its applications") (emphasis added); *id.* (TCA must show "that all applications of SB 5 disadvantage TCTA's members").

[11] *See* Pet. App. 15a n.4 ("The reasons we have noted above are sufficient to conclude that the district court erred in dismissing the TCTA's complaint for lack of standing and that the case must proceed to the next step. We will, however, briefly note further arguments that defendants make *regarding standing*.") (emphasis added); *id.* 7a ("Several prospective competitors to the TCTA's members join in this [injury-in-fact] argument, but along slightly different lines. Expanding on a brief statement made by the district court, they urge that the TCTA has challenged the Act on its face; as such, the TCTA must show not only that the Act is unconstitutional in all of its applications, *but that it also has caused concrete injury in all of its applications*. The argument continues, asserting that, because of the nature of the TCTA's claims, its failure to state the specific ways in which all or any of its members have been injured *is fatal to a claim of standing*.") (emphasis added).

That the court of appeals limited itself to standing is not surprising: the district court had dismissed the complaint on grounds of standing. The district court never reached the merits, and the main argument on appeal likewise did not involve the merits: the question was simply whether the district court had erred in dismissing TCA's complaint for lack of injury-in-fact. In addition, the court of appeals was not required to reach each of AT&T's arguments for affirmance on alternative grounds.[12] Moreover, it would have been unfair to reach an alternative ground involving pleading requirements raised for the first time on appeal.[13]

As for AT&T's standing argument, the Fifth Circuit correctly rejected it. As the court of appeals noted, this Court has held that, in a facial challenge, a plaintiff may "vindicate not only his own rights, but [also] those of others who may also be adversely impacted by the statute in question."[14] Besides, the

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[12] *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below."); *Magallon v. Livingston*, 453 F.3d 268, 273 (5th Cir. 2006) ("The state argues that we may affirm the court's dismissal on alternative grounds. . . . We think these questions are best handled by the court below in the first instance in the event that they arise on remand.").

[13] *See* TCA's Fifth Circuit Reply Br. at 16 ("Affirming on an alternative ground is particularly inappropriate where, as here, an alternative ground hinges on a supposed pleading defect that, if credited, could have been corrected in the district court.").

[14] Pet. App. 16a (quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights,

court of appeals noted, TCA's lawsuit does not seek to vindicate the rights of others, because it is not a facial challenge at all: TCA is "only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court."[15]

In reading the court of appeals opinion to reject AT&T's other argument, AT&T is not only wrong but also alone. The defendant proper in this case, the State of Texas, has not sought certiorari. Quite the contrary: it has expressly disavowed AT&T's view, reading footnote 4 merely as relating only to

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but those of others who may also be adversely impacted by the statute in question."). In *Morales*, the dissent expressly agreed with the plurality on this point. *See* 527 U.S. at 80 n.3 (1999) (Scalia, J., dissenting) ("Disagreement over the *Salerno* rule is not a disagreement over the 'standing' question whether the person challenging the statute can *raise* the rights of third parties: under both *Salerno* and the plurality's rule he *can*. The disagreement relates to *how many* third-party rights he must *prove to be infringed* by the statute before he can *win*: *Salerno* says 'all' (in addition to his own rights), the plurality says 'many.' That is not a question of standing but of substantive law.").

[15] Pet. App. 16a; *see also* TCA's Fifth Circuit Reply Br. at 17 ("TCTA's discrimination claims do not constitute a 'facial challenge' in the sense in which that term is used in the cases on which AT&T relies. TCTA's complaint alleges that each of its members is an incumbent cable operator; that Texas has enacted a statute providing benefits to cable operators; that the statute makes one subset of cable operators (incumbents) ineligible; and that, insofar as it does so, the statute violates federal law. TCTA does not rely on the rights of persons other than its members. TCTA does not conjure up hypothetical cases. TCTA does not seek relief going beyond its members. Thus, TCTA's claim is no different from an 'as applied' claim brought by individual TCTA members.").

standing.[16] The district court has likewise indicated that it is leaning that way.[17]

In fact, even AT&T itself does not appear to be fully committed to its broader reading. In the wake of the court of appeals' decision, AT&T urged the district court that, even though AT&T is seeking review on the basis of its broader reading, the other defendants should remain free to defend S.B. 5 on

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[16] *See* Opp. App. 9a-10a ("THE COURT: Do you think the Fifth Circuit reached the facial challenge argument on the merits? [COUNSEL FOR THE STATE]: No. THE COURT: Or only as an adjunct to the standing argument? [COUNSEL FOR THE STATE]: The only thing — only with the — the latter with regard to standing . . . ."); *id.* at 10a ("[COUNSEL FOR THE STATE]: What they said — what they wrote in that footnote, what I remember what they were addressing, particularly I think AT&T but to some extent other defendants, appellees had taking — had — had argued that under the law of standing they have to plead facts that show in every single conceivable application the law would be unconstitutional. And I think that's what they're saying they weren't buying. . . . They weren't saying we disagree with the assertion that this is a facial challenge. I don't see that anywhere.").

[17] *See id.* at 4a-5a ("THE COURT: I do not read the last sentence of Footnote 4 the way you do. I take that in the context of the standing argument that was raised earlier. In the first sentence of that last paragraph in Footnote 4 starts out, the defendants also argue that TCTA has made — that the TCTA has mounted a facial challenge, therefore, it must show every injury — must show injury in every application of the act. And then it goes back into discussing the standing and then ends up — in any event, both of the defendants' arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of first associational standing or second a facial challenge lack merit. I think that's related to standing.").

the basis of a narrower reading.[18] There is no need for this Court to analyze a reading of a court of appeals opinion that is advanced only by an intervenor, and even then only with an apparent view to increase the odds of securing review.

2. AT&T Misreads the Opinions of Other Courts of Appeals.

Even if the Fifth Circuit had rejected AT&T's first argument, there would still not have been a circuit split: AT&T is wrong in suggesting that the Second and Eleventh Circuits have embraced AT&T's pleading argument. Insofar as those courts have said anything about facial challenges, they have merely reiterated the *Salerno* standard — they did not hold that the *Salerno* standard (that the challenged measure cannot lawfully be applied in any circumstance) must be pleaded in the complaint.

Thus, in *Rent Stabilization Association of New York v. Dinkins*, 5 F.3d 591 (2d Cir. 1993), the Second Circuit held that an association's facial challenge on takings grounds to a rent-control regulation failed where the association had conceded that there were valid applications.[19] The court nowhere

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[18] *See id.* at 11a ("[COUNSEL FOR AT&T]: I also want to just point out that . . . AT&T Texas is acting alone in this endeavor in seeking further review. . . . I think it's inaccurate to say that . . . the course we take somehow binds the entire defense side or waives arguments or constitutes some sort of admission that the complaint is something other than it is.").

[19] *See* 5 F.3d at 595 ("The [association] implicitly concedes, as it must, that the [challenged measure] has not abridged the constitutional rights of those landlords who *do* obtain an adequate return from the annual rent increases.").

held that a plaintiff must plead that the measure under challenge is invalid in all possible applications — rather, the court held only that the plaintiff had advanced no argument to that effect.

Incidentally, the consequence of the failure of the facial challenge was not (as AT&T would apparently have it) that the association's complaint had to be dismissed — rather, the Second Circuit simply characterized the association's challenge as an "as applied" claim and analyzed it as such.[20] In doing so, moreover, the court specifically recognized that associations are entitled to bring as-applied challenges to discrimination that appears from the face of a regulation.[21]

AT&T's reliance on the Eleventh Circuit decision, *Georgia Cemetery Association, Inc. v. Cox*, 353 F.3d 1319 (11th Cir. 2003), is even more puzzling. Whereas the Second Circuit at least mentioned the plaintiff's complaint as providing an additional indication that the plaintiff was not arguing that the challenged measure was invalid in all settings,[22] the

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[20] *See id.* at 592 ("we believe that the RSA has asserted only 'as applied' challenges to New York's rent stabilization scheme"); *id.* at 593 (recounting that the district court "found that the RSA's facial takings claims . . . failed to set forth a truly facial attack on the statute"); *id.* at 594 ("We believe that the RSA's complaint alleges only 'as applied' objections to the law.").

[21] *See id.* at 596-97 ("associations do have standing to bring 'as applied' challenges" where a claim that its members "had been denied equal protection depended on a purely legal analysis of the ordinance and of the law of Equal Protection").

[22] *See id.* at 595 (noting that the complaint alleged only that the challenged measure would deprive "many" of the association's members of a constitutionally adequate return).

Eleventh Circuit did not do even that. Rather, it simply held that the defendant had convincingly argued that there were instances in which the statute could be applied lawfully, and that the plaintiff had failed to provide a convincing reply.[23] And, like the Second Circuit, the Eleventh Circuit also held that a plaintiff unable to bring a successful facial challenge may still pursue an as-applied challenge.[24]

AT&T is also wrong in asserting (at 15) that "the decision below adds to the confusion among the federal courts on the threshold question whether *Salerno* remains good law." For one thing, AT&T is wrong in suggesting that the Fifth Circuit cast doubt on *Salerno*'s validity by citing the plurality opinion in *Morales*. The court of appeals relied on *Morales* only for a point relating to standing — not to wade into the debate about the necessary quantum of invalidity. For another thing, other circuits suffer no "confusion" either: the opinions to which AT&T points state only that some of this Court's members have disagreed on the quantum of invalidity that is necessary to support a facial challenge — not that there is conflict among the circuits.

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[23] *See* 353 F.3d at 1322 ("The defendant thus properly argues that the Association cannot make the showing necessary for . . . a successful facial challenge . . . .").

[24] That the Second and Eleventh Circuits did not embrace AT&T's pleading rule is not surprising. There is no sign that the defendants before them advanced the pleading argument that AT&T advances here. Moreover, AT&T's argument appears at odds with the Federal Rules of Civil Procedure, which require a complaint to contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

C. This Case Is Not a Suitable Vehicle for Review.

Quite apart from the absence of any conflict among the circuits, this case would be a poor vehicle to address issues relating to facial challenges: nothing turns on them.[25]

For one thing, as the Fifth Circuit correctly held, TCA's is not a facial challenge but an as-applied challenge. Incumbent cable operators were denied a state-issued franchise by S.B. 5 itself; given that S.B. 5 by its terms makes incumbents ineligible, the discrimination against them is complete.[26] That the discrimination against incumbent cable operators is effected by the statute itself does not make TCA's claim a facial challenge subject to the standard of *Salerno*. AT&T confuses a facial challenge with an

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[25] *See, e.g.*, Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* 231 (8th ed. 2002) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

[26] *See, e.g.*, *South Dakota Mining Ass'n, Inc. v. Lawrence County*, 155 F.3d 1005, 1008-09 (8th Cir. 1998) ("Under the plain text of the Lawrence County ordinance, none of the plaintiffs may be granted a new or amended permit for surface metal mining on any of their mining claims within the Spearfish Canyon Area. Because applying for and being denied a county permit for surface metal mining would be an exercise in futility, we will not require plaintiffs to do so before they may challenge the ordinance."); *Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639, 643 (3d Cir. 1995) ("[T]here is no indication that the aspiring midwives possibly could obtain a license . . . . Requiring these women to apply for a license . . . accordingly would serve no purpose. Litigants are not required to make such futile gestures to establish ripeness.").

as-applied challenge to discrimination appearing from the face of the statute.

For another thing, in the wake of the Fifth Circuit's decision, TCA has been joined by an individual plaintiff, Time Warner Cable. There can be no question that Time Warner Cable's claim is an as-applied challenge: Time Warner Cable argues simply that its cable systems in Texas are being discriminated against. There is no authority for AT&T's novel suggestion (at 22, 27 n.11) that even an individual plaintiff seeking to avenge multiple instances of discrimination loses across-the-board if it loses with respect to even a single instance.[27]

Finally, even if the claims brought in this case somehow qualified as facial challenges, it would still make no difference to the outcome in this litigation. AT&T argues that, if TCA's lawsuit is a facial challenge, TCA's complaint must allege that S.B. 5 is unlawful in every application, and that it cannot do so — supposedly because there are two sets of circumstances in which S.B. 5 would be valid. But AT&T misapprehends applicable substantive law: in the two instances that AT&T hypothesizes, S.B. 5 would still be just as unlawful.

First, AT&T argues (at 19) that there may be instances in which a municipal franchise is less burdensome than a state-issued franchise, and that, in those instances, there could not be any unlawful discrimination. But a plaintiff complaining of dis-

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[27] The authorities that AT&T cites for that suggestion (at 22 n.9) held only that a facial challenge fails when the challenged measure is not unlawful as applied to the plaintiff himself — not that, when a plaintiff brings an as-applied challenge to multiple applications, he must prevail on each or lose on all.

crimination need plead and prove only that his treatment is disparate — not that his treatment is in some relevant sense "worse."[28] It is unsurprising that the law does not require the additional showing: it is unclear how a plaintiff could prove that the applies he received are worse than the oranges he desired.[29]

Second, AT&T argues (at 20) that there may be localities in which incumbent cable operators are not subject to competition from an overbuilder. But, under applicable substantive law, that is irrelevant. If S.B. 5 made Catholic cable operators ineligible for state-issued franchises, AT&T could not avoid a finding of discrimination by arguing that some Catholic cable operators are not subject to competition from Protestant cable operators: whether or not

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[28] *See EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1233 (9th Cir. 1984) ("The essence of disparate treatment is different treatment . . . . It does not matter whether the treatment is better or worse, only that it is different.") (external quotations and parentheses omitted); *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1373 n.2 (S.D. Fla. 2002) ("Defendants' attempt to create a 'separate but equal' media room for [excluded journalists] does not comport with the case law requiring all news reporters be given equal access to places reserved for the media."); *see also* Pet. App. 14a-15a ("Here, the Act facially discriminates against the TCTA's membership by extending the benefit of a state-wide license to its competitors while denying that same benefit to incumbent cable providers. As *Northeastern* held, such discrimination can constitute an injury because it positions similar parties unequally before the law; no further showing of suffering based on that unequal positioning is required for purposes of standing.").

[29] Besides, as TCA explained below, its complaint does allege that municipal franchises are more onerous than state-issued franchises. *See* TCA's Fifth Circuit Reply Br. at 21.

subject to competition, Catholic cable operators would be treated disparately, and that is enough. Just so here: incumbent cable operators are being treated differently than they would be if they were non-incumbent cable operators, and that discrimination must be justified.

II. THERE IS NO WARRANT FOR A GVR.

Finally, AT&T argues that the Court should grant, vacate, and remand in light of a decision that this Court handed down shortly after the Fifth Circuit's denial of rehearing — *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008). But this Court GVRs only when there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and where "such a redetermination may determine the ultimate outcome of the litigation."[30] Here, the probability of such a redetermination is non-existent.

The court of appeals addressed an argument that a facial-challenge plaintiff must show standing to challenge every application of the challenged measure, an argument that it rejected on the grounds (1) that a facial-challenge plaintiff has standing to complain of the violation of the rights of third parties (so long as he has standing to complain of the violation of his own rights), and (2) that TCA's lawsuit is not a facial challenge in the first place. *Grange* has nothing to say about the correctness of

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[30] *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam).

either determination: it does not address either the interplay between standing and facial challenges or the taxonomy of claims as either "facial" or "as applied."

What *Grange* did have to say on the topic of facial challenges broke no new ground. *Grange* merely applied settled principles of law to the facts and circumstances of the case before it. For example, all of the language that AT&T quotes from *Grange* was supported by citations to prior decisions antedating the Fifth Circuit's decision. Thus, there is nothing new for the Fifth Circuit to consider. At best, a GVR would waste the Fifth Circuit's time. At worst, a GVR would become a tool for mischief.[31] There is no warrant for either result.

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[31] *See, e.g., Youngblood v. West Virginia*, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) ("Those whose judgments we review have sometimes viewed . . . our . . . GVR orders as polite directives that they reverse themselves.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 13, 2008

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION,
Plaintiff,

v.

PAUL HUDSON, JULIE PARSLEY, BARRY SMITHERMAN,
Defendants,

TCCFUI, GTE SOUTHWEST INC., SOUTHWESTERN BELL TELEPHONE, L.P., GRANDE COMMUNICATIONS NETWORKS, INC.,
Intervenor Defendants.

[Civil Action No. A-05-CV-721 LY]

Austin, Texas
April 23, 2008

Transcript of Status Conference After Remand
Before The Honorable Lee Yeakel
United States District Judge

Proceedings reported by stenotype, transcript produced by Computer-aided transcription.

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* * *

[5] THE COURT: Well, good morning. We've been up once and we've come back. And I'm sure that all of you have carefully parsed the opinion of the Fifth Circuit and are prepared to tell me exactly what it means and where we are and how we should proceed from here. So I am more than willing.

I'll start with the plaintiff. Mr. Brands, Mr. George, anything you would like to share? This is a status conference. It can be relatively informal. I am mainly interested today in finding out what the positions of the parties are and making a determination of how best to proceed from this point.

MR. BRANDS: Your Honor, very briefly. Our position is that we should simply go ahead with this case. What happened previously is that the defendants raised ten or more defenses, some threshold defenses, some defenses on the merits. Three of those have now been whittled away: standing ripeness, facial challenge or I should say for.

THE COURT: Well, tell me about facial challenge. I'm not sure the way I read this opinion

that has been whittled away. The circuit clearly has held — and it's the law of the case now — that Texas Cable & Telecommunications Association has standing and the allegations in the complaint are ripe to [6] consider. I think the opinion is less lucid when it comes to the discussion of the facial issues. And one thing I would like you to address is with this suit having been filed, as the Fifth Circuit noted the day after the passage of the act, how can it be anything other than a facial challenge?

MR. BRANDS: Your Honor, first of all, I point to the last sentence of Footnote 4 in the opinion on Page 13, which says — and I quote — that the arguments about facial challenge quote, unquote lack merit. And in our view that's the end of that. And it also makes a lot of sense because TCTA is here in a representational capacity. It is simply trying to raise the rights of its members. It is not raising the rights of third parties who are not before the Court.

THE COURT: I do not read the last sentence of Footnote 4 the way you do. I take that in the context of the standing argument that was raised earlier. In the first sentence of that last paragraph in Footnote 4 starts out, the defendants also argue that TCTA has made — that the TCTA has mounted a facial challenge, therefore, it must show every injury — must show injury in every application of the act. And then it goes back into discussing the standing and then ends up — in any event, both of the defendants' arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of first associational standing or second a facial challenge lack merit.

[7] I think that's related to standing. I don't think it disposes of the facial challenge arguments to the act. What — and I get back to what I said earlier. What — what is this case about if it is not a challenge to the act on its face as being unconstitutional?

MR. BRANDS: Your Honor, respectfully, the party that raised this argument, AT&T, Mr. Michael Kellogg, who is not here today, but he raised this argument. He said that this footnote means that the facial challenge argument is now inapposite, as he put it in his petition for rehearing. In other words, Mr. Kellogg apparently has decided to go for broke and has decided not to rest on Your Honor's interpretation and has effectively waived that. In other words, that issue is out of the case and not even a —

THE COURT: So what issue is in the case? What is this case?

* * *

[11] THE COURT: And at this point I'll hear from the defendants, whoever wants to proceed first, Mr. Todd, on where you think we are and what the suggestions of the defendants are.

MR. BRANDS: Thank you, Your Honor.

MR. TODD: Yes, Your Honor. From the state's standpoint, I would suggest there are two ways we could possibly proceed.

* * *

There's a greater ambiguity today as to whether this is an as applied or a facial challenge, and that makes a huge difference. The cri —

THE COURT: Well, tell me about that.

MR. TODD: Yes.

THE COURT: If — if the suit was filed the day after the statute took effect —

MR. TODD: Right.

[12] THE COURT: — it hadn't really been applied to anybody.

MR. TODD: Right.

THE COURT: So distinguish between facial challenge and as applied —

MR. TODD: Certainly.

THE COURT: — challenge here. Because as a general rule, when the legislature passes an act and it's immediately attacked before there's any water under the bridge —

MR. TODD: Right.

THE COURT: — that in my country way of thinking is a facial attack on the challenge. On the statute, that you look at the statute.

MR. TODD: Right.

THE COURT: You need go no farther than the statute to see what its application is going to be and who it's going to affect, and that's a facial attack.

MR. TODD: As of — as a matter of fact, Your Honor, as of the latest live pleading, which is first amended complaint, you go through that pleading, and over and over again it has all the indicia of a facial challenge. A majority of the discussion of facts, quote/unquote, are really descriptions of law. That's — that's a symptom of a facial challenge.

When you look at the relief —

[13] THE COURT: Now Mr. Brands says that you've waived facial challenge.

MR. TODD: Well, now he was referring to AT&T.

THE COURT: Okay.

MR. TODD: Let me make it clear. I think I'm the only one here who hasn't written you a letter.

THE COURT: And that's to your credit.

MR. TODD: Thank you.

THE COURT: Okay?

MR. TODD: The — no, the — first of all, I don't know how you waive whether or not something is facial or as applied. That's kind of a legal determination, and I don't see how you could waive it.

But if you look at the relief, the very first declaration that they ask for is a declaration that the law is illegal, unconstitutional insofar as it empowers the PUC to issue franchises at all. That's facial.

If you look at their counts, they've divided it into four counts. Just as a side note, the federal courts of long says you're — we're really not supposed to be doing this in counts. It's supposed to be more discrete claims. But nevertheless, each one of the counts concludes —

THE COURT: It looks like you ought to title it discrete claim one and discrete claim two instead of —

MR. TODD: Well, actually with —

[14] THE COURT: — count one and count —

MR. TODD: — within each count you can — it actually breaks down. Each count has a couple of claims within it.

But anyway, each one concludes with the statement that the statute is superseded and preempted by federal law.

Now the law of federal preemption of state regulatory statutes is pretty clear now. If a statute's superseded and preempted by federal law, it doesn't matter if the statute does good things or bad things. You can't enforce it, period. And that's the hallmark of the facial challenge.

Really, I didn't find anything in the pleadings, the count — the counts or claims for relief. And then the — the relief stated itself that lends itself very much to as applied. But to the extent that they say that they're bringing an as applied challenge, I think that that requires further analysis because I know our motion to dismiss and certainly the brief I wrote to the Fifth Circuit were premised on the assumption that this is a facial challenge.

If indeed there are the — the first —

THE COURT: Do you think the Fifth Circuit reached the facial challenge argument on the merits?

MR. TODD: No.

THE COURT: Or only as an adjunct to the standing argument?

MR. TODD: The only thing — only with the — the [15] latter with regard to standing — and let me

say this. I also disagree with the statement that standing and ripeness have been removed from the case. All the Fifth Circuit has said is that on the pleadings they have pled standing. They have pled facts that if proven would give them standing to bring this claim.

But also in the decision — and I apologize. I walked away from my office without a copy of the decision. But I remember saying and I remember the statements at oral argument also, that doesn't mean that standing can't be raised again on summary judgment. I mean, all they've said is they've pled standing. So standing is still an issue, a potential issue in the case. It's just no longer an issue on the pleadings.

THE COURT: Well, I will —

MR. TODD: Thank you.

THE COURT: I will just kind of tell you at this stage I'm not really very interested in spending a whole lot more time on standing.

MR. TODD: No, I — and nor am I.

THE COURT: The way I read it, the Fifth Circuit has said that the association is in, and believe me the last thing I want to see on summary judgment is another standing argument. I'm going to let them be here and argue and —

MR. TODD: Sure.

[16] THE COURT: — we're going to the merits with this —

MR. TODD: Sure.

THE COURT: — at this point.

MR. TODD: If we get as far as that, I understand that. That that's just prudent. But I'm saying that the Fifth Circuit addressed its decision only to what was shown by the pleadings, and I think they addressed this as a facial — treat it as a facial challenge.

What they said — what they wrote in that footnote, what I remember what they were addressing, particularly I think AT&T but to some extent other defendants, appellees had taking — had — had argued that under the law of standing they have to plead facts that show in every single conceivable application the law would be unconstitutional. And I think that's what they're saying they weren't buying.

They weren't saying we disagree with the assertion that this is a facial challenge. I don't see that anywhere. And I — they may have left open the possibility that the plaintiffs want to come back and make a — an as applied challenge, but I think that's very different from the challenge they brought.

* * *

[30] MR. STRETCH: Thank you, Your Honor. Colin Stretch on behalf of AT&T Texas. I would just like to make a couple of brief points, if I may.

If I could start just with the Fifth Circuit's decision, and I don't think it was entirely accurate what plaintiff's counsel ascribed to us.

The Fifth Circuit itself emphasized the posture of the case which was a motion to dismiss. We had argued that in light of the facial challenge that TCTA had brought, they had to allege that the

statute is unlawful in all its applications. And they had failed to do that, and it should be dismissed.

We do think that argument was rejected in the Fifth Circuit decision. We think it's wrong. We're seeking further review of that. But that Fifth Circuit decision doesn't somehow transform the complaint into something it's not.

* * *

[31] I also want to just point out that insofar as arguments about waiver were raised, AT&T Texas is acting alone in this endeavor in seeking further review. And so that's another reason why I think it's inaccurate to say that what — the course we take somehow binds the entire defense side or waives arguments or constitutes some sort of admission that the complaint is something other than it is.

* * *

(2)

No. 07-1550

FILED
JUL 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T TEXAS,

Petitioner,

v.

TEXAS CABLE ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Texas Coalition of Cities for Utility Issues responds in support of the Petition for a Writ of Certiorari by Southwestern Bell Telephone Company d/b/a AT&T Texas ("AT&T Texas"), seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

A. TCCFUI's involvement with Senate Bill 5 legislation and litigation

The Texas Coalition of Cities for Utility Issues ("TCCFUI") is a statewide unincorporated non-profit association of more than a hundred Texas municipalities concerned with utility issues. Of particular concern to TCCFUI is the development of government policy on the use of municipal rights-of-way by private telecommunications and cable companies. This concern precipitated TCCFUI's active participation in the negotiation and development of the state legislation that is the focus of this case, popularly known as Senate Bill 5 and codified as Chapter 66 of the Texas Utilities Code.[1]

TCCFUI intervened, siding with the state in defense of the bill, when the Texas Cable Association launched its facial challenge to core provisions of

[1] This background about TCCFUI is drawn from its unopposed motion to intervene in the Texas Cable Association's challenge to Senate Bill 5.

Senate Bill 5. TCCFUI's objective was to ensure protection of the legislation's transitional provisions, designed to protect the reliance interests of Texas cities while the state's system for franchising cable operators moved from a municipal-level to a state-level system.

Thus, as a party-participant in both the district and appellate court proceedings below, TCCFUI is a respondent to AT&T Texas's certiorari petition; however, inasmuch as TCCFUI supports AT&T Texas's request that this Court review the judgment below, it is responding in support of, not in opposition to, the petition. *See* Supreme Court Rule 12.6.

As authorized by Supreme Court Rule 24.2, TCCFUI will not repeat here the sections of AT&T Texas's certiorari petition stating the question presented, listing the parties to the petition, providing citations to the decisions below, identifying the jurisdictional basis for review, and setting out the constitutional and statutory provisions involved. But, because of TCCFUI's unique interest in Senate Bill 5's transitional provisions, it will briefly supplement the petition's statement of the case.[2]

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[2] TCCFUI does not subscribe in every particular to the local franchising discussion in Part A and the opening sections of Part B of AT&T Texas's Statement of the Case. *See* AT&T Cert. Pet. 2-6. However, TCCFUI perceives no need to distract the Court with supplemental discussion here of any points that may be at variance with AT&T's characterization. It suffices that Senate Bill 5 was a product of hard-fought compromises and that both

(Continued on following page)

B. The Senate Bill 5 transition period and municipal reliance interests

In many TCCFUI member cities at the time of Senate Bill 5's consideration and passage, cable operators were providing local cable service under the auspices of unique, individualized municipal cable franchises that they had negotiated separately with each city. These cable operators included both participating members of the Texas Cable Association (typically referred to as "incumbent operators") and "overbuilders" (described by the court below as "companies that build cable systems in areas that are already served by another cable operator," AT&T Pet. App. 3a).

These municipal franchises were rarely, if ever, identical. Instead, their provisions typically were crafted to address specific local concerns. Among the varying provisions were the franchise fee amounts and formulas; customer service standards (*i.e.*, local standards for timeliness of installations, how to credit outages, and responsiveness of call-in assistance centers); and public service components (*e.g.*, "cable drops" to municipal and public school buildings and local "institutional network" capacity).[3] The duration

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AT&T Texas and TCCFUI are defending it, especially its transition provisions, against the challenge of the Texas Cable Association.

[3] The federal definition of "institutional network" is "a communication network which is constructed or operated by the

(Continued on following page)

of the local franchises also varied and, when Senate Bill 5 passed, the remaining "life" on these local franchises varied widely from city to city.

The Texas Legislature, therefore, had to determine how to integrate the phase-out of the municipal franchising system, which was at the core of Senate Bill 5, with the fact that cities all across the state had built up significant reliance interests in the extant municipal franchises – and with the fact that both the substantive provisions and the remaining time under those franchises varied widely. No simple "on-off" switch could account for these differences consistently with the need for a smooth transition that took into account *all* affected interests – state, municipal, consumers, incumbent providers, overbuilders, and new telecommunications entrants.

In 1984, Congress had to confront the same conundrum about existing local franchises when it enacted broad federal cable reform legislation. It solved the problem by establishing a transitional grandfathering system, allowing existing local franchises to continue until they expired. *See* 47 U.S.C. § 557. The Texas Legislature took a similar approach. In simple terms, it provided in Senate Bill 5 for a transition period that required cable operators to honor their existing local agreements with municipalities until they expired, while allowing those same

---

cable operator and which is generally available only to subscribers who are not residential subscribers." 47 U.S.C. § 531(f).

cable operators to obtain the new state-issued franchises anywhere outside their existing local franchise areas. In short, the state-level franchise system was available to everyone, with the only difference being that cable operators had to complete their agreed obligations under existing local franchise agreements in the specific areas covered by those agreements.

C. TCCFUI's argument that the relief being sought required participation of the Cable Association's individual members

The Cable Association's facial challenge sought to abrogate the local obligations that remained for its members during Senate Bill 5's transitional, "grandfather" phase. TCCFUI was among those defending the grandfathering rules, arguing to the district court that the Cable Association had failed to identify any concrete harm to any of its members and noting an apparent acknowledgement that "some local franchises imposed *less* onerous requirements than state-level ones." TCCFUI Post-Argument Letter Brief at 2-3 (emphasis in original).

On appeal, TCCFUI argued that the Cable Association had failed to satisfy the third prong of the three-part *Hunt* test[4] for associational standing. The argument was that, because the local impact of Senate Bill 5's transitional rules would vary tremendously

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[4] *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

from local franchise to local franchise, the Cable Association's claim for relief under its facial challenge could not be determined without participation of its individual members.

The court of appeals rejected TCCFUI's *Hunt*-based argument. AT&T Pet. App. 15a-16a n.4 (concluding that "member participation is not required here"). In the same discussion, the court of appeals also rejected AT&T Texas's *Salerno* "no-set-of-circumstances"[5] argument about the Cable Association's facial challenge. *Id.*

REASONS FOR GRANTING THE PETITION

I. AT&T Texas presents a question the Court should consider.

TCCFUI subscribes to the reasons AT&T Texas gives for why its petition should be granted. *See* AT&T Cert. Pet. 11-29. TCCFUI agrees, for example, that the courts of appeals are divided on the applicability of *Salerno* to associational facial challenges. In addition, TCCFUI agrees that, at a minimum, the Court should grant the petition, vacate the judgment below, and remand the case for further consideration in light of *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184 (2008).

[5] *United States v. Salerno*, 481 U.S. 739 (1987).

TCCFUI adds here a related point, discussed further below, not directly addressed in the petition.[6]

II. Distinguishing between the applicability of the *Salerno* test and the third prong of *Hunt*'s associational standing test in the context of facial constitutional challenges is an added reason for granting the writ.

TCCFUI argued – unsuccessfully – to the court of appeals that the Cable Association did not satisfy the third prong of *Hunt*'s test for associational standing. This limitation is a prudential one, not grounded in Article III of the Constitution. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996). An association does not satisfy this part of the *Hunt* test unless "neither *the claim asserted* nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343 (emphasis added). TCCFUI's position was that the Cable Association's claim that Senate Bill 5's transitional provisions work a blanket disadvantage to its members could not possibly be tested without participation of the association members actually subject to the widely varying local

---

[6] As a respondent and party to the proceeding below, TCCFUI "may seek reversal of the judgment of the Court of Appeals on any ground urged in that court." *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783 n.14 (1980). TCCFUI does not perceive its argument as different in kind from AT&T Texas's, but, to the extent it is, the Court still may consider it.

franchises that were being grandfathered. The reason was that some of the grandfathered local franchises very well could be *less* onerous than a state franchise under Senate Bill 5.

It is not obvious that there is any difference between the *Salerno* "no-set-of-circumstances" requirement that facial challenges must meet in order to be viable and *Hunt*'s third-prong associational standing inquiry about whether an association's claim for relief must give way because it requires participation of individual members. Certainly, the lower courts have difficulty discerning any difference and do not seem to apply either doctrine with useful consistency.

The Fifth Circuit in this case effectively merged them into a single analysis, culminating in the umbrella conclusion that the facial challenge could proceed without the participation of any individual members of the Cable Association. Yet, the Eleventh Circuit, also effectively treating the two matters (*Salerno* on the one hand, and *Hunt*'s third prong on the other) as opposite sides of the same coin, reached the opposite result. *See Georgia Cemetery Ass'n v. Cox*, 353 F.3d 1319, 1322 (11th Cir. 2003) (holding that the facial challenge could not proceed without participation of individual members).

The Eleventh Circuit's *Georgia Cemetery* opinion openly acknowledges confusion about whether the *bona fides* of the facial challenge at issue there is to be evaluated using *Salerno*'s "no-set-of-circumstances"

rubric or *Hunt*'s "individual participation of members" third-prong rubric. It explains that it is reaching the same conclusion "[w]hether viewed as a standing argument or a merits argument," then, in the next paragraph, cites both *Salerno*'s and *Hunt*'s basic tests. 353 F.3d at 1322.

Even more recently, another circuit – the Eighth – has addressed virtually the identical issue in a facial challenge context, employing *Hunt*'s associational standing analysis without even citing *Salerno* and its test. *See Missouri Protection and Advocacy Svcs., Inc. v. Carnahan*, 499 F.3d 803, 809-10 (2007) (rejecting a facial constitutional challenge on associational standing grounds because the lawsuit "may not properly go forward without the participation of one or more individual[s]").[7]

AT&T Texas is correct in urging that the question of how to apply the *Salerno* test for facial constitutional challenges lodged by associations, instead of the specifically affected individual entities, deserves this Court's consideration. Adding to the reason for review in this particular case is the continued tentativeness in the lower courts in handling the interplay

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[7] The Second and Tenth Circuits also have used the need for individual members' participation as a reason to reject constitutional challenges by associations under *Hunt*'s third prong. *See Rent Stabilization Ass'n of New York v. Dinkins*, 5 F.3d 591, 595-97 (2d Cir. 1993); *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social and Rehabilitation Svcs.*, 958 F.2d 1018, 1021-23 (10th Cir. 1993).

between the *Salerno* principle and associational standing rules under *Hunt*'s third prong in the facial challenge context.

The issues in this case provide the Court an opportunity to provide lower courts further useful clarification about how to adjudicate broad, association-based facial constitutional attacks on state legislation forged from intricate compromises among competing interests. The question raised by the third prong of *Hunt*, as does the question raised by the *Salerno* test highlighted by AT&T Texas, implicates the concerns about the speculative nature of facial challenges that this Court recently raised in *Washington State Grange*, *supra*, 128 S.Ct. at 1191 (observing that "[c]laims of facial invalidity often rest on speculation"). Both are aimed at alleviating that concern when the circumstances demand it. Clarification of which mode of analysis – *Salerno*'s or *Hunt*'s – is better applied to the circumstance of facial constitutional challenges by associational litigants is an added reason for the Court to hear this case – or, at a minimum, grant the petition, vacate the judgment, and remand for consideration in light of the concerns addressed in *Washington State Grange*.

CONCLUSION

The Court should grant AT&T Texas's petition for a writ of certiorari.

Respectfully submitted,

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July 2, 2008

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(3)

No. 07-1550

FILED
AUG 2 7 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY
D/B/A AT&T TEXAS,
Petitioner,

v.

TEXAS CABLE ASSOCIATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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August 27, 2008

CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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I. THE DECISION BELOW DIVIDES THE CIRCUITS AND DEEPENS CONFUSION REGARDING *SALERNO*

A. The Fifth Circuit held that TCTA could maintain a facial challenge to SB 5 on behalf of its members notwithstanding that it was clear from the face of the complaint (and other record evidence) that not all applications of SB 5 to TCTA's members are unlawful. Based on the *Morales* plurality, the Fifth Circuit held, as TCTA had urged, that *Salerno*'s no-set-of-circumstances standard is inapposite because "TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court." Pet. App. 16a n.4. TCTA continues to defend (at 10) that position here: TCTA's lawsuit "is not a facial challenge" subject to *Salerno*, TCTA claims, because TCTA "does not seek to vindicate the rights of others." That position directly conflicts with decisions of the Second and Eleventh Circuits, which have held that *Salerno* governs even when an association seeks relief only on behalf of its members. *See* Pet. 12-15.

TCTA denies this conflict by mischaracterizing AT&T's position and misreading the Second and Eleventh Circuit decisions. TCTA contends (at 12) that AT&T has made only a "pleading argument" and that neither the Second nor the Eleventh Circuit has held that the *Salerno* standard "must be pleaded in the complaint." TCTA is wrong on both counts.

First, AT&T's position is not that an association must *recite* the *Salerno* standard in its complaint. TCTA's complaint should be dismissed because it failed to make an allegation — that SB 5 is unlawful in all applications — necessary to the relief it seeks. Indeed, the allegations that TCTA did make conceded

that *Salerno*'s standard could not be met, *see* Pet. 18-19,[1] and legislative evidence (properly considered on a motion to dismiss[2]) confirms that TCTA cannot satisfy *Salerno*'s standard, *see* Pet. 19-20.

Second, TCTA's claim that the Second and Eleventh Circuit decisions impose no pleading requirement on facial challenges is wrong. In *Rent Stabilization Association v. Dinkins*, 5 F.3d 591 (2d Cir. 1993), the Second Circuit held that an *allegation* that "'*many*'" of an association's members "are victims of a taking" effectively conceded the challenged rules were not universally unconstitutional. *Id.* The court held that, "far from alleging" that the rules "act unconstitutionally in every circumstance" — as required under *Salerno* — *the complaint* made clear that the rules were unconstitutional "in only limited subcategories of possible circumstances." *Id.* The Second Circuit's decision thus establishes that an association's *allegations* can plead the association out of court with respect to *Salerno*; under that standard, TCTA's complaint would be dismissed. *See* Pet. 18-21.

In *Georgia Cemetery Association, Inc. v. Cox*, 353 F.3d 1319 (11th Cir. 2003) (per curiam), the Eleventh Circuit affirmed a Rule 12(b)(6) dismissal of an association's facial constitutional claims. Although the association sought relief only "on behalf of its

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[1] *See Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992) (Posner, J.) (even assuming plaintiff is not required to make particular allegations, "plaintiff can plead himself out of court"; "[i]f he alleges facts that show he isn't entitled to a judgment, he's out of luck").

[2] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007); *Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir. 1995).

members," the court invoked *Salerno* and identified circumstances under which the challenged statute could be lawfully applied to the association's members; "[u]nder those circumstances," the Eleventh Circuit held, "there would not be grounds for *alleging* an unconstitutional taking as to all of its members." *Id.* at 1322 (emphasis added). For that reason, the court held that "the district court did not err by granting judgment on the pleadings." *Id.* at 1322-23. The Second Circuit's decision teaches that an association's broad claim for relief on behalf of its members fails at the *pleading* stage if there are instances in which the statute can be constitutionally applied to the association's members; under that standard, TCTA's complaint would again be dismissed. *See* Pet. 18-21.

B. The petition further establishes that the Fifth Circuit — by relying on *Morales*'s account of facial-challenge rules rather than *Salerno*'s no-set-of-circumstances standard — deepens confusion in federal courts regarding the scope and vitality of *Salerno*. *See* Pet. 15-17.

In response, TCTA insists (at 14) that the Fifth Circuit cast no "doubt on *Salerno*'s validity" because the court "relied on *Morales* only for a point relating to standing." But the critical point is that, following TCTA's own argument, the Fifth Circuit held that *Salerno*'s rule is inapposite because TCTA is seeking relief only on behalf of its members and because *Salerno* may no longer be good law. *See* Pet. 15-16. Whether the Fifth Circuit credited those arguments in assessing standing or in assessing the adequacy of TCTA's claims more broadly, the decision below adds to the confusion regarding the scope and applicability of *Salerno* and the taxonomy of facial challenges.

TCTA also argues (at 14) that there is no confusion in the federal courts regarding *Salerno* because the decisions cited in the petition "state only that some of this Court's members have disagreed about" *Salerno*. This argument is particularly specious given TCTA's own efforts below to cast doubt on *Salerno*. *See* Pet. 15 n.7. As the Ninth Circuit has said, "[j]urisprudence appears to be *divided* on the question whether the *Salerno* 'no set of circumstances' standard is dicta or whether it is to be generally applied to facial challenges." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007) (emphasis added).

II. THIS IS AN APPROPRIATE VEHICLE

This case directly presents the issue of whether an association that challenges a legislative enactment across-the-board on the theory that it is unlawful on "the face of the statute" (Opp. 16) is subject to the rule of *Salerno*. That is a pure question of law that has been briefed and passed on below and that involves, among other things, reconciliation of this Court's decision in *Salerno* and the plurality in *Morales*. *See* Pet. 26-27. TCTA challenges the suitability of this case to address that question, but its arguments are misplaced.

A. TCTA argues first that, because the Fifth Circuit's holding comes in an unpublished opinion, plenary review is unwarranted. That is so, TCTA insists (at 6), because the Fifth Circuit itself can resolve "any . . . conflict." But it is very unlikely that the Fifth Circuit itself or the courts of appeals collectively will settle this issue without this Court's intervention: the Fifth Circuit's narrow understanding of *Salerno* is not an isolated phenomenon (Pet. 12 n.5); multiple courts of appeals have expressed confusion regarding the meaning and vitality of *Salerno* (Pet.

15-17); and this Court's guidance is particularly warranted to resolve the issue in view of the fractured nature of *Morales* and continuing criticism of *Salerno* (Pet. 26).

Furthermore, this Court has shown time and again that it is willing to review unpublished decisions. *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001) (per curiam); *Los Angeles County v. Rettele*, 127 S. Ct. 1989, 1991-92 (2007) (per curiam). And with good reason: "[t]he fact that the Court of Appeals' opinion is unpublished is irrelevant. . . . An unpublished opinion may have a lingering effect in the Circuit[.]" *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., joined by O'Connor & Souter, JJ., dissenting from denial of certiorari). The Court should be particularly willing to review an unpublished decision where (as here) a lower court creates a circuit split by ignoring a fundamental limit on constitutional litigation. *See* Pet. 24-26. TCTA does not deny, moreover, that the Fifth Circuit's holding, although unpublished, may well affect the application of *Salerno* and *Morales* in associational facial challenges outside the Fifth Circuit. *See* Fed. R. App. P. 32.1; 5th Cir. R. 28.7.

B. TCTA also argues (at 7-12) that there is a dispute about the meaning of the Fifth Circuit's decision, which renders plenary review inappropriate. As TCTA sees it, the Fifth Circuit's decision is confined to standing and did not reach what it describes (at 4) as AT&T's "alternative ground for affirmance."

TCTA itself, however, has previously rejected this exact reading of the Fifth Circuit's decision. Shortly

after the Fifth Circuit's decision, TCTA informed the district court that the Fifth Circuit had "rejected alternative grounds for affirmance advanced by some of the intervenors." Letter from Henk Brands to Hon. Lee Yeakel at 1 (Feb. 19, 2008). TCTA said that AT&T advanced *Salerno* as "an alternative ground for affirmance," but that "[t]he court of appeals rejected the argument *on the merits*, holding that 'arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of . . . a facial challenge[] lack merit.'" *Id.* at 2 (quoting Pet. App. 16a n.4) (emphasis added; ellipsis in original). TCTA subsequently reiterated this position to the district court. *See* Resp. App. 4a.

In any event, whether the decision below is limited to standing (Rule 12(b)(2)) or whether it also addresses issues relating to failure to state a claim (Rule 12(b)(6)) is of no moment. The applicability of the *Salerno* standard to associations can be properly considered under either rubric. The key fact is that the Fifth Circuit allowed TCTA to evade *Salerno* on the ground that "TCTA is only asserting the interests of its members . . . , rather than the interests of third parties," Pet. App. 16a n.4; *see* Opp. 10, regardless of the breadth of TCTA's claims and its requested relief. The petition establishes that that understanding of *Salerno* is deeply flawed, conflicts with decisions of other courts of appeals, and raises issues of recurring practical importance. *See* Pet. 12-15, 17-24, 25-26. Whether the Fifth Circuit's decision is read in terms of standing or whether TCTA stated a proper facial challenge, the decision disregarded the rule of *Salerno* on the ground that the association foreswore relief on behalf of third parties. It is *that* legal error that warrants this Court's review.

C. Finally, TCTA argues (at 16) that this case is an unfit vehicle because TCTA "has been joined by an individual plaintiff, Time Warner Cable," and because Time Warner Cable is bringing an "as-applied challenge." TCTA's stratagem of belatedly adding one of its members to the case does not diminish the necessity of review, for two reasons.

First, the associational plaintiff (TCTA) continues to seek broad, across-the-board relief for all its members based on the face of the statute and the same allegations made the day after SB 5 was enacted. The Fifth Circuit's holding remains directly applicable to TCTA's entitlement to relief.

Second, Time Warner Cable — along with TCTA — has itself taken the position that, "[a]t the summary judgment stage, plaintiffs may submit evidence relating to a limited number of municipalities that will exemplify how S.B. 5 affects incumbent cable operators." Letter from Henk Brands to John Barry at 4 (June 18, 2008). Time Warner Cable and TCTA thus purport to use "limited" illustrative examples of the supposed unlawfulness of SB 5 to warrant a sweeping request for statewide relief. That approach illustrates concretely that the scope and applicability of *Salerno* remain directly relevant to the litigation. *Cf.* Robert L. Stern *et al.*, *Supreme Court Practice* 259 (8th ed. 2002) (where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status").

III. TCTA CANNOT SATISFY *SALERNO*

A. Under *Salerno*, TCTA must establish that SB 5 is unlawful in all applications to TCTA's members. TCTA's complaint makes clear that it cannot satisfy that standard for two reasons.

First, TCTA has alleged only that *some* municipal franchises are more onerous than state-level franchises, *see* First Am. Compl. ¶ 22, which (just as in *Dinkins*) impliedly concedes that not *all* municipal franchises are more onerous than SB 5 franchises. Despite amending its complaint a second time, TCTA has left those qualified allegations in place. And the record demonstrates why TCTA cannot remedy these allegations: some municipal franchise agreements are, in fact, less burdensome than SB 5 franchises. *See* Pet. 18-19.

Second, in many parts of Texas, incumbents face no competition under SB 5 from either overbuilders or new entrants. *See* Pet. 20. The core of TCTA's claims is that SB 5 unlawfully treats incumbents differently from overbuilders. Yet TCTA seeks an across-the-board remedy that would allow incumbents to abandon their franchises everywhere in the State — based on purportedly discriminatory treatment of incumbents and overbuilders — even in municipalities where no overbuilder exists.

Because there are instances in which SB 5 may be lawfully applied, TCTA's members must pursue constitutional claims on a municipality-by-municipality basis. *See, e.g., Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912).

B. TCTA argues in response (at 16) that, "in the two instances that AT&T hypothesizes, S.B. 5 would still be just as unlawful." TCTA is wrong.

TCTA says (at 17) that it does not matter if an SB 5 franchise is more burdensome than a municipal franchise; TCTA must prove only that SB 5 treats incumbents differently, not worse. But mere difference in treatment is not sufficient to invalidate a statutory classification; the Constitution requires a plaintiff to be *disadvantaged* by a classification. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (equal protection plaintiff is one within a "disfavored group"). None of TCTA's authorities (at 17 n.28) supports the bizarre proposition that the Constitution gives plaintiffs who are unaffected by (or even benefit from) a classification a cause of action to strike it down,[3] and this Court's precedent is to the contrary. *Cf., e.g., Diamond v. Charles*, 476 U.S. 54, 66-67 (1986) ("Article III requires more than a desire to vindicate value interests.").

TCTA also argues that the Constitution requires that its members be free to abrogate their existing franchises — based on difference in treatment between incumbents and overbuilders — even in areas of Texas where there is not now and has never been an overbuilder. That is so, TCTA argues (at 17), because, "[i]f S.B. 5 made Catholic cable operators ineligible for state-issued franchises, AT&T could not avoid a finding of discrimination by arguing that some Catholic cable operators are not subject to competition from Protestant cable operators." While

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[3] *EEOC v. Inland Marine Industries*, 729 F.2d 1229 (9th Cir. 1984), is a Title VII case; the Ninth Circuit did not speak to whether a constitutional discrimination claim requires the plaintiff to be disadvantaged by a classification. The plaintiff in *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368 (S.D. Fla. 2002), was materially harmed by the discrimination. *See id.* at 1374 n.3.

invidious classifications may inflict "stigmatizing injury" even if they do not put members of a class at any other disadvantage, *see Heckler*, 465 U.S. at 739-40 (Equal Protection Clause protects against classifications that "perpetuat[e] archaic and stereotypic notions" and "stigmatiz[e] members of the disfavored group") (internal quotation marks omitted), TCTA's objection to SB 5 is economic: it believes that the statute exposes cable incumbents to competition on a less than level playing field. TCTA does not allege that SB 5 imposes stigmatic harm on incumbent cable providers, and it is therefore insufficient to allege only that the legislation at issue distinguishes incumbent providers from other video service providers.

IV. A GVR IS WARRANTED

Subsequent to the Fifth Circuit's decision, this Court issued *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008), which emphasized the disfavored nature of facial challenges, provided a full discussion of the purposes of restrictions on facial claims, and announced a consensus standard for judging such claims. That decision undermines the foundations of the decision below and warrants a GVR.

First, *Washington State Grange* makes unmistakably clear that facial-challenge restrictions do more than govern third-party standing. *See* Pet. 29. Because the decision below rests on a contrary understanding of the purposes of such restrictions, *Washington State Grange* plainly undermines the basis for the decision. Contrary to TCTA's claim (at 18), moreover, this Court's elucidation of the purposes served by facial-challenge rules bears directly on whether TCTA's "lawsuit is [or is] not a facial challenge in

the first place." The purposes served by such rules — including *Salerno*'s no-set-of-circumstances standard — necessarily influence which claims are and are not subject to *Salerno*'s standard.

Second, this Court announced a new agreed-upon standard for facial challenges: "all [members of the Court] agree that a facial challenge must fail where the statute has a plainly legitimate sweep." 128 S. Ct. at 1190 (internal quotation marks omitted). Contrary to TCTA's assessment (at 19), this Court thus *did* "br[eak] . . . new ground." Indeed, in the short period since this Court's decision, several courts of appeals have relied on *Washington State Grange* in evaluating facial claims.[4] This standard, moreover, would compel dismissal of TCTA's claims because there are "plainly" instances in which SB 5's grandfathering provision may be "legitimate[ly]" applied to TCTA's members. *See* Pet. 17-21.

For these reasons, a GVR would neither "waste the Fifth Circuit's time" nor serve as "a tool for mischief," as TCTA asserts (at 19). The only possibility for "mischief" here is continued confusion in the Fifth Circuit and potentially elsewhere — in this case and in others — regarding the scope and applicability of this Court's rules governing facial challenges.

CONCLUSION

The Court should grant review of the Fifth Circuit's judgment or GVR in light of *Washington State Grange*.

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[4] *See, e.g., Warshak v. United States*, 532 F.3d 521, 529 (6th Cir. 2008) (en banc); *Baude v. Heath*, Nos. 07-3323 & 07-3338, 2008 WL 3115356, at *3 (7th Cir. Aug. 7, 2008) (to be reported at — F.3d —).

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August 27, 2008